91-1619

No. 91-____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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ANTHONY VULPIS, ROSEDALE CARTING, INC.,
and VULPIS BROTHERS, LTD.,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the unilateral expectation of future revenues by a governmental entity is a property right protected by the mail fraud statute absent a duty to pay.

2. Whether the courts misapplied the Rule 403 balancing test when admitting evidence that neither the prosecutor, the court, nor the parties involved had originally viewed as a crime or wrongful act under Rule 404(b).

3. Whether the courts below failed to make the required findings when imposing a guideline sentence for offenses which were not charged, did not result in conviction, and were not the subject of stipulation.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Second Circuit were the United States of America and Angelo Paccione, Anthony Vulpis, John J. McDonald, A&A Land Development, Stage Carting, Inc., August Recycling, Inc., New York Environmental Contractors, Inc., National Carting, Inc., Rosedale Carting, Inc., and Vulpis Brothers, Ltd.

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IN THE
SUPREME COURT of the UNITED STATES
October Term, 1991

No. 91-

ANTHONY VULPIS, ROSEDALE CARTING, INC.,
and VULPIS BROTHERS, LTD.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals For The Second Circuit

Anthony Vulpis, Rosedale Carting, Inc., and Vulpis Brothers, Ltd., petition for a writ of certiorari to review the judgment of the panel of the United States Court of Appeals for the Second Circuit, which affirmed petitioners' convictions for violations of the racketeering statute, conspiracy to violate the racketeering statute, and mail fraud.

OPINIONS BELOW

The opinion of the Court of Appeals, reported as United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991), is reprinted in the Appendix to this petition at A1. The District Court opinions reported at 738 F. Supp. 691, 749 F. Supp. 748, and 751 F. Supp. 368 are reprinted at B1, C1, and D1. The order of the Court of Appeals denying the petitioners' petition for rehearing appears in the Appendix at page E1.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 15, 1991. A timely petition for rehearing was denied on January 10, 1992, and this petition for writ of certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Title 18, United States Code:

§ 1341. Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 28, United States Code:

Fed. R. Evid. 403: Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 404(b): Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

United States Sentencing Guidelines:

§ 1B1.2(a): The court shall apply the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction. Provided, however, in the case of conviction by a plea of guilty or nolo contendere containing a stipulation that specifically establishes a more serious offense than the offense of conviction, the court shall apply the guideline in such chapter most applicable to the stipulated offense. Similarly, stipulations to additional offenses are treated as if the defendant had been convicted of separate counts charging those offenses.

STATEMENT OF THE CASE

On October 11, 1990, after a jury trial before Judge Motley in the Southern District of New York, petitioners along with codefendants Angelo Paccione, A&A Land Development, Stage Carting, Inc., August Recycling, Inc., and National Carting, Inc., were convicted of one substantive violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), one RICO conspiracy count, 18 U.S.C. § 1962(d), and five counts of mail fraud, 18 U.S.C. § 1341 and 2.[1] Both RICO counts were based primarily on predicate acts of mail fraud.

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[1] Paccione was convicted of an additional mail fraud count and defendant McDonald was convicted on only one count of mail fraud. A separate petition for a writ of certiorari will be filed with this Court on behalf of Paccione and the Paccione companies. Pursuant to Supreme Court Rule 19.4, petitioners join in the arguments raised in that petition to the extent they are applicable to them and not inconsistent with the positions urged in this petition.

Petitioners' convictions were based on the operation of an illegal landfill on the former Arlington Railroad Yard, a Staten Island property owned by CSX, a Virginia corporation. The government charged petitioners and the codefendants with a scheme to defraud CSX of the value of its property by using Arlington Yard as a landfill without CSX's authorization for four months, from May through September, 1988. The government also maintained that through the operation of the illegal landfill, the defendants had defrauded New York City and State of licenses, licensing fees, and dumping fees that the City and State would have received if the waste materials deposited on the CSX property had been taken to the City owned landfill, Fresh Kills. In addition, the government had charged a third scheme to defraud involving the transfer, storage and transportation of medical waste, and petitioners were acquitted of those charges. Thus, based upon correspondence and telephone calls with various State and City agencies as well as an out-of-state corporation, the government converted a state case grounded in illegal dumping into a federal RICO offense by utilizing the mail and wire fraud charges as predicate acts. However, the indictment did not charge the defendants with violations of any federal environmental regulations nor did it specify what city, state or federal environmental laws might be involved.

At trial petitioners' defense was (i) that CSX had given its approval for the landfill operation at Arlington Yard but claimed otherwise in the face of an official investigation, and (ii) that the materials received at the landfill were in compliance with the various formal regulations and informal practices governing such operations, including the receipt of up to ten percent of "unacceptable" material.

The Alleged Fraud on New York City

New York City operated the only two landfills within the city for the disposal of waste, the largest being Fresh Kills Sanitary Landfill ("Fresh Kills") on Staten Island. Residential waste and garbage were collected by the City Department of Sanitation ("CDOS") and taken to Fresh Kills. Private carters, who must be licensed by the City Department of Consumer Affairs ("CDCA"), handled waste collections from commercial and industrial establishments. Private carters were allowed to use the city landfill only if they had been issued a permit and if they purchased dump tickets in advance. City sanitation trucks paid no fees, of course, for the use of Fresh Kills.

From March 1988 through September 1988, Fresh Kills charged $18.50 per cubic yard for the disposal of trash and construction or demolition debris. A higher fee was charged for the disposal of asbestos, which was classified as hazardous waste. As early as May 9, 1988, it was public knowledge that a $60 million increase in fees for the use of Fresh Kills had been proposed, and, in October 1988, the rate was increased to $40.00 per cubic yard. Raising the rates made Fresh Kills less attractive to private carters who had once dumped eight to nine thousand tons per day. After the price increase, the City lost $100 million in fees per fiscal year.

Petitioner Vulpis and his codefendant, Angelo Paccione, operated private carting businesses in the New York City boroughs of

Brooklyn and Queens. Petitioner was fifty percent owner of the defendant companies Rosedale Carting, Inc. and Vulpis Brothers, Ltd. (collectively the "Vulpis companies"). Paccione was the president and majority shareholder of the defendant companies August Recycling, Inc., National Carting, Inc., and Stage Carting, Inc. (collectively the "Paccione companies").

The CDOS kept monthly records of the number of dump tickets purchased and used by each private carter. These records demonstrated that the Vulpis and Paccione companies sharply reduced their purchase of dump tickets starting in May 1988. However, New York City had no regulation or statute requiring private carters who operated within the city to use the New York City landfills. In addition to the city landfills, private carters used landfills located elsewhere in New York State as well as out-of-state facilities.

Some city waste materials were never taken to landfills as they could be utilized for construction purposes. New York City regulations permitted the use of "clean waste" or "clean fill"--clean earth, dirt, concrete, rock, gravel, stone, sand--to upgrade building sites provided the necessary permits were obtained. In early 1988, Vulpis and Paccione, who were also the owners of A&A Land Development, were contacted by Kenneth I. Wilpon, a real estate broker and owner of undeveloped property on Staten Island. The Staten Island property was known as Arlington Yard, a former railroad yard, and consisted of three parcels of land. Two parcels, 35 acres, were owned by Wilpon and the third parcel, 72 acres, was owned by CSX, an out-of-state corporation. In 1988, Wilpon, along with his partner Fred Weiss, and CSX entered into a joint marketing proposal to sell the three parcels as a unit as a site for residential housing. To develop the land for this use, the grade of the property had to be raised, and Wilpon proposed to CSX that clean fill be placed on their properties for this purpose. CSX considered the landfill proposal and negotiations continued throughout the summer of 1988, but CSX never gave written consent to a landfill operation on its property.

In May 1988, A&A Land Development began the landfill operation on the Wilpon property after obtaining the required street opening permit from the City Department of Transportation (CDOT) and a letter of acknowledgment from the City Department of Sanitation (CDOS). These permits related only to the Wilpon properties and indicated that clean fill material would be placed on the site. Additional and renewal permits were issued by the CDOT to A&A Land Development in July and August 1988. The permit fees were calculated on the cubic yards of fill material to be used, and fees based on over 340,000 cubic yards were paid.

Between May 1988 and mid-September 1988, A&A Land Development operated an all purpose landfill on both the Wilpon and CSX properties. Approximately 550,000 cubic yards of material--including clean fill, construction and demolition debris, garbage, and five pounds of asbestos--were deposited on several acres of Arlington Yard. The government's evidence included videotaped surveillance of trucks dumping at the site. The landfill was closed by the State Department of Environmental Control on September 14, 1988.

The government maintained that through the operation of the landfill, the Vulpis and Paccione companies saved $4,625,000 in dumping fees that would have been paid to the City for use of the Fresh Kills facility. A&A charged other companies $10 per cubic yard to dump at the site, thus diverting additional fees that would have been paid to Fresh Kills. In its four months of operation, A&A earned approximately $2.6 million. By using the CSX property as a landfill, the government charged that CSX had been defrauded of the value of its land. The cost to cleanup the CSX property was placed at $15 million.

The Alleged Bribe Offers

During the defense case, the prior sworn testimony of Wilpon's partner, Fred Weiss, was read to the jury. Weiss had testified at an earlier civil proceeding concerning his conversation with Baker, an officer with the DEC, on September 14, 1988, the day the landfill was closed. A portion of the property was excavated in the presence of Weiss, Vulpis, and Baker, and Weiss testified that "[W]e were very surprised they found some household garbage." Erroneously viewing petitioners' defense at trial as a denial that any garbage had been placed on the property, the district court ruled that testimony of purported bribe offers by petitioner, not admitted on the direct case, would be admitted on rebuttal.

The district court overruled petitioner's objections that the testimony lacked probative value and that any value was outweighed by its prejudicial impact, citing Fed. R. Evid. 403. The court instructed the jury that additional testimony was being presented by the government on the issue of petitioner's intent. James Milewski, an officer with the DEC, then testified that on September 14, 1988, while the landfill was being inspected, Vulpis told him that he was "losing approximately $80,000, and how about $50,000." Milewski did not consider the statement to be a bribe attempt and took no further action beyond an oral report to his supervisor.

David Baker, an officer with the DEC, also spoke to petitioner on the same day, and testified that petitioner told him, "I'm losing $75,000 a day every day the place is closed. How about $100,000, you just go away?" Baker reported the conversation to his supervisor but made no further written or oral report of the incident. Although Baker had told the court out of the presence of the jury that he had not viewed the comment as a bribe offer, the district court would not permit defense counsel to elicit this testimony, ruling that the witness's state of mind was not relevant. The district court denied counsel a recess to obtain materials prior to cross-examination on the rebuttal testimony and also denied Vulpis an opportunity to present surrebuttal on this new evidence.

However, the government's rebuttal case was a reversal of the government's and the district court's prior view of the evidence. When the Baker testimony had been elicited on direct without notice to the defendants, both the district court and the government had taken the position that the meaning of the remark was entirely unclear and could have been a reference by Vulpis to a consent decree and to daily penalties. Just prior to Vulpis's comment, Baker had discussed a consent decree and informed Vulpis that penalties could run $25,000 per day. During its direct case, the government told the court that it had never taken the position that petitioner's statement constituted a bribe offer. At that time, the district court reserved decision on petitioner's mistrial motion, and the government agreed to strike the direct testimony.

The disputed "bribe" testimony was the last testimony heard by the jury prior to its deliberations. In closing arguments, the government utilized this controversial evidence to the fullest extent, maintaining that petitioner's comments to Baker and Milewski were very important evidence of his guilt. Significantly, petitioner was acquitted of all charges unrelated to the bribe testimony. At sentencing, the district court rejected the government's request for an increased sentence based on the bribe offers, finding that petitioner had no knowledge of the landfill investigation and that the officers had not considered the statements to be bribe offers.

The Sentence

As noted above, the jury ultimately returned guilty verdicts on the RICO charges and five counts of mail fraud against petitioners. The district court sentenced Vulpis to a term of 151 months after upwardly departing from the guideline recommendation of 63-78 months. In lieu of forfeiture, fines, and restitution, Vulpis, Paccione, and the corporate defendants had entered into a court-approved agreement to pay the government $22 million.

When calculating petitioner's RICO sentence pursuant to the Sentencing Guidelines, the district court used the higher guidelines applicable to predicate acts of environmental crimes, § 2Q1.2 (mishandling of hazardous or toxic substances or pesticides), rather than the lower guidelines applicable to mail fraud, § 2F1.1. Petitioners had not been charged with environmental offenses and the indictment did not specify any city, state or federal regulatory or environmental statute violated by petitioners' actions. The predicate acts found by jury against petitioners all involved fraud. The use of § 2Q1.2 was erroneous because the sentencing court must use the guideline most applicable to the offense of conviction unless the defendant stipulates to a more serious offense. U.S.S.G. § 1B1.2(a). The district court compounded this error by treating the purported environmental offenses as counts of conviction for purposes of the multiple count rules in § 3D1.2. The district court increased the offense level based on the belief that the purported uncharged and untried environmental crimes could be treated as offenses of conviction for purposes of the Guideline calculation. The resulting sentence was double that recommended in the presentence report. The district court stated that it would, in any event, have departed upward under § 5K2.0 or § 5K2.5 to reach the same result.

THE COURT OF APPEALS DECISION

A panel of the Court of Appeals affirmed petitioners' convictions. A-4. In affirming the mail fraud convictions, the Court reaffirmed prior decisions holding that fees payable to the government for services or taxes are property for purposes of the mail fraud statute. A-22. Licensing fees and dumping fees for use of Fresh Kills and payable to New York City were held to fall within the mail fraud statute. The Court found that a loss of City revenues had been established given evidence of declining fees paid to Fresh Kills while the A&A landfill was operating and given past use of Fresh Kills by the defendant companies and others.

A-25. The Court rejected petitioners' argument that a scheme to defraud of the City of future income must be predicated on an obligation to use the City's facility.

The Court of Appeals held that the bribe offers were properly admitted under Fed. R. Evid. 404(b) to negate a defense of accident or mistake and to show petitioner's intent to commit the offense. A-32. Under this analysis, the probative value of the evidence outweighed the potential for prejudice. Fed. R. Evid. 403. However, the Court of Appeals opinion never addressed the ambiguous nature of the testimony and the fact that neither officer had viewed petitioner's comments as a bribe offer. The Court also ignored the district court's and the government's original positions that the statements were not bribe offers. Without any discussion, the Court concluded that the

Rule 403 balancing had been properly conducted. A-33, 34.

The Court of Appeals also affirmed the sentences. While acknowledging that petitioners' objections to the sentencing procedure had merit, the Court declined to remand for recalculation of the sentences given the district court's ruling that it would have departed upward if the Guidelines did not permit the procedure it had followed. A-43, A-47, A-48.

REASONS FOR GRANTING THE WRIT

A. A GOVERNMENTAL ENTITY'S UNILATERAL EXPECTATION OF FUTURE REVENUE IS NOT A PROPERTY RIGHT PROTECTED BY THE MAIL FRAUD STATUTE ABSENT A DUTY TO PAY.

Under this Court's decisions in McNally v. United States, 483 U.S. 350 (1987), and Carpenter v. United States, 484 U.S. 19 (1987), the mail fraud statute (18 U.S.C. § 1341) protects victims only from the loss of money or property. Schemes to defraud citizens of certain intangible rights are beyond the reach of the mail fraud statute. While some intangible interests, such as the interest in the confidentiality of information, have been held to be property rights within the scope of the mail fraud statute, the statute requires that the victim first have a right to the property involved, whether tangible or intangible. No such right existed here, and the Court of

Appeals erred in affirming petitioners' convictions of three counts of mail fraud.

The government sought to avoid the holdings in McNally and Carpenter by asserting that New York City had a property right in revenues from dumping fees that would have been paid to the City if the waste material unlawfully dumped at Arlington Yard had instead been dumped at the City's Fresh Kills Landfill. Under the government's theory, the defendants thus defrauded the City of dumping fees in excess of $7 million through the operation of an illegal landfill.

This theory is fatally flawed, however, as there was no requirement that the defendants, and other private carters, use the New York City landfill. Thus, while the City operated the only legal landfills in New York City, private carters were not required to use those landfills. In fact, other facilities in New York State and in neighboring states were available and were used by private carters. Nor did the City have individual contracts with any of the private carters requiring them to use the City facilities. Thus, the City did not have exclusive control of or "ownership" rights in the garbage generated within the City which would support a claim that the City had a right to the revenue produced by fees for the disposal of that garbage. The City had no more than a unilateral expectation of future revenue and not a property right.

The cases relied on by the Court of Appeals fail to support its decision for, as set forth below, each deals with a well-recognized obligation to pay either government taxes or to use services in the exclusive control of the government. The Second Circuit failed to provide any legal authority to support its decision where the use of a government service is optional. The Court facilely dismissed the issue with these words:

> Second, defendants argue that the City failed to prove any cognizable loss of dumping fees because defendants had no obligation to dump at Fresh Kills. We are unpersuaded. Fresh Kills was the largest dump site in the City. Defendants and other companies that used the A&A illegal dump site had previously dumped at Fresh Kills, and the government presented evidence showing that City revenues from that facility declined precipitously during the time of operation of the A&A dump. It was within the province of the jury to consider these facts, as well as the additional expense that would have been incurred by carters traveling to dump outside of the City, and to infer that the defendants' conduct cost the City fees it would otherwise have received.

(A-25).

This Court clearly and unequivocally stated in McNally that "we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."[2] 483 U.S. at 360. A governmental entity's right to future revenues--the property right alleged to be involved here--has been recognized in only a few exceptional circumstances not applicable to this case. As discussed below, courts have recognized a government's right to collect sales tax, income tax, and licensing fees of various types. However, in each such case brought under the mail fraud statute, the property right was based on a statutory obligation to pay the monies, and the mail fraud statute was held to protect the governmental entities' recognized right to these revenues. No such statute or right exists in this case.

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[2] The mailings involved in these three counts occurred prior to November 18, 1988, the effective date of Congress's most recent amendment of the mail fraud statute. 18 U.S.C. § 1346 amended the definition of mail fraud to include "a scheme or artifice to deprive another of the intangible right of honest services."

The special circumstances presented in United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S. Ct. 53 (1989), illustrate when a state's property interest in future revenue can be legally recognized. Porcelli was a mail fraud prosecution of a gasoline merchant who had not collected sales tax, and later filed false returns in order to hide his liability. Under New York law, there are separate obligations to collect sales tax and to remit to the state the sales tax due on the sales, whether or not the taxes were collected from the buyer. Porcelli claimed he could not have defrauded the state of the money since he never collected the taxes. But the Second Circuit sustained a mail fraud prosecution on the ground that Porcelli had deprived the state of its statutory right to collect the taxes. In Porcelli, the property rights clearly existed apart from the scheme to defraud and were derived directly from the defendant's sales tax obligation. Under New York law, the obligation to pay sales tax is a legal duty and the state's right to recover the sales tax is the exclusive right of the state. Porcelli presented a unique and vastly distinct set of facts and legal circumstances than does this case. Here there was no obligation on the part of the defendants to pay the dumping fees unless they used the facility and clearly no right of the state to collect fees from those who chose not to use the facility. Hence, the state could not be deprived any property in this situation.

A similar situation was presented in United States v. Helmsley, 941 F.2d 71 (2d Cir. 1991), cert. denied, 117 L. Ed.2d 489 (1992), where the Court of Appeals affirmed the defendant's conviction on ten counts of mail fraud where a scheme to defraud New

York State of income tax owned was established but no actual tax debt existed. The Court reasoned that the statute punishes the scheme to deprive of money or property and the success of the scheme is not required. Id. at 94. However, Helmsley like Porcelli was premised on the existence of the State's property interest or property right in the taxes. And the property right was based on a statutory obligation to pay imposed by the State upon the taxpayer.

In petitioner's case, there was no requirement that he use the City facility, thus creating an obligation to pay. Nor did he use the City facility without paying the requisite fees by, for example, counterfeiting dump tickets or dumping at Fresh Kills without paying. Petitioner provided a service to those who used the A&A landfill and received payment for that service. Those who used petitioner's landfill were under no obligation to use the city facilities and were not themselves defrauded by petitioner.

Obligations to pay licensing fees imposed by a governmental entity have also provided the statutory basis for mail fraud prosecutions where the scheme attempted to evade payment of those fees. The First Circuit Court of Appeals affirmed the conviction for conspiracy to commit mail fraud in United States v. Dray, 901 F.2d 1132, 1142 (1st Cir. 1990), cert. denied, 111 S. Ct. 245 (1990), premised on the underpayment of construction permit fees. According to law, the permit fee was calculated based upon the cost of the construction work, and by underestimating the construction cost, the defendant paid roughly half of the required permit fee. In rejecting the defendant's challenge to the conviction under McNally, the Court stated:

> In this case, the permit fee was no mere unilateral expectation, as appellant exhorts, but a legal obligation. Where such fees are required, conspiracies to avoid paying them deprive the sovereign of a very concrete and tangible kind of property--cash. We think it obvious that a governmental agency is deprived of "money or property" when persons attempt to evade, or divert, the payment of legally required fees and taxes.

The Court of Appeals in petitioner's case cited Dray to support its decision, but Dray would be analogous only if New York City imposed a tax or fee on all garbage picked up within the City by private carters or required the use of the City facility by private carters. Only then could the Fresh Kills dumping fees be properly viewed as revenue which the City was entitled to collect even when the Fresh Kills facility was not used. The permit fee in Dray was nothing more than a tax on all construction within the city of Boston. No such tax has been imposed on New York City garbage.

In a similar vein, the district court in United States v. Turoff, 701 F. Supp. 981 (E.D.N.Y. 1988), held that the government had properly charged the defendants under the mail fraud statute based upon a scheme to defraud the New York City of taxi medallions and annual license renewal fees. The court concluded that the medallions were personal property of the City, and the defendants had been charged with misappropriating that property and depriving the City of the required annual renewal fees for each medallion. However, the medallions--whether viewed as licenses[3] or property--were controlled by the City which maintained a monopoly on their creation. Unlike the situation presented in Turoff, the City has not yet claimed a monopoly on garbage generated within the city. Hence, defendants here did not take the City's property without paying the required fees. The defendants did not use the City landfill at all and were under no obligation to do so. Thus, the government cannot claim a property right in the unpaid fees, and there is no cognizable loss under McNally.

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[3] Since the Turoff decision, the Second Circuit has joined a majority of the Courts of Appeals in holding that licenses are not property for purposes of the mail fraud statute. See United States v. Schwartz, 924 F.2d 410 (2d Cir. 1991) and cases cited therein; cf. United States v. Martinez, 905 F.2d 709 (3d Cir.), cert. denied, 111 S.Ct. 591 (1990).

What Dray and Turoff have in common is the existence of a commodity that is only available through the regulating governmental entity. The same peculiar characteristic was present in United States v. Gelb, 881 F.2d 1155, 1162 (2d Cir.), cert. denied, 110 S. Ct. 544 (1989), also cited by the Court of Appeals when affirming petitioners' conviction. The defendants in Gelb had been charged with a scheme to defraud the Post Office of revenue through the improper packaging of mass mailings. The service involved, however, was available only through the Post Office and, thus, was like the taxi medallions in Turoff.

Moreover, the decision here is at odds with the Court of Appeals' earlier decision in United States v. Evans, 844 F.2d 36 (2d Cir. 1988), which recognized that the right to control the future alienation and use of a thing "does not mean that all such rights are property rights within the meaning of the federal fraud statutes." Id. at 41. "A law prohibiting a particular use of a commodity that the government does not use or possess ordinarily does not create a property right." Id. at 42. While the city and state maintain the right to regulate and control the private carting industry as well as the disposal of waste materials, those regulations do not create property rights in the material regulated. Furthermore, when a property right exists, it should be possible to determine when it arises. If the City of New York had a property right in future revenues from dumping fees, then the right must arise when the trash is picked up by private carters within the city. However, this analysis fails since the carters were permitted to dispose of the refuse outside of the City and the City facilities.

The Second Circuit's decision represents a dangerous expansion of the mail fraud statute for it effectively eliminates the "money or property" element of the offense which this Court reaffirmed in McNally. Indeed almost every commercial transaction will involve some economic consequences that could be transformed into mail fraud "property" under the Second Circuit's expansive construction of the statute. The mail fraud statute would thus be converted into an all purpose criminal statute, a result that is contrary to the original intent of the statute and contrary to this Court's opinions in McNally and Carpenter.

This case presents an opportunity for this Court to further clarify its holdings under McNally and Carpenter and to check the expansion of the mail fraud statute. A writ of certiorari should therefore issue to review the decision of the United States Court of Appeals for the Second Circuit.

B. THE COURTS MISAPPLIED THE RULE 403 BALANCING TEST WHEN ADMITTING EVIDENCE THAT NEITHER THE PROSECUTOR, THE COURT, NOR THE PARTIES INVOLVED HAD ORIGINALLY VIEWED AS A CRIME OR WRONGFUL ACT UNDER RULE 404(b).

Prior to the admission of similar or other crimes evidence under Fed. R. Evid. 404(b), the district court must determine "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar [or other] act." Huddleston v. United States, 485 U.S. 681, 685 (1988). Once that requirement has been satisfied, the court must balance the probative value of the evidence against the potential prejudicial effect of that evidence. Fed. R. Evid. 403. When assessing probative value, the "strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing." Huddleston at 689, n. 6.

In this case, the courts below misapplied the Rule 403 balancing test and erroneously admitted highly prejudicial testimony of alleged bribe offers. Insufficient evidence had been presented to support a finding that any bribe offers had been made by petitioner. Neither officer had made written reports concerning the incidents despite the large sums of money allegedly offered. Furthermore, the district court's initial reaction had been that the conversation between Baker and petitioner referred to payment of a fine as it had been made in the context of Baker's remarks about consent orders and potential daily fines of $25,000. Even the prosecution initially maintained that it had not viewed petitioner's statement to Baker to be a bribe offer.

Moreover, the officers who participated in the conversations with petitioner stated that they had not viewed the remarks as bribe offers. The district court disregarded this testimony in the mistaken belief that the officers' reaction to the alleged offers was not probative of whether or not a bribe had in fact been offered. The court was in error. In United States v. Murphy, 768 F.2d 1518, 1535 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986), involving prosecution of a judge under the Hobbs Act for offenses involving bribery, the court held that how the participants in the conversations held in chambers interpreted the defendant's remarks was relevant and admissible. Accord United States v. Gelb, 881 F.2d 1155, 1663 (2d Cir.), cert. denied, 100 S. Ct. 544 (1989) (postal employees, who testified against defendant charged with bribery, stated that initially they considered the money to be tips but became suspicious when the tips became larger). The district court's mistaken belief that the officers' reaction to petitioner's remarks was not relevant resulted not only in the admission of the disputed testimony at trial, but, once admitted, the court would not permit defense counsel to elicit the fact that the officer had not viewed petitioner's remarks as a bribe offer.

Given the highly ambiguous nature of the purported bribe testimony, the courts below erred in concluding that it was properly admissible under the Rule 403 balancing test. As this Court observed in Huddleston, the strength of the evidence establishing the similar or other criminal act is a factor when making an evaluation under Rule 403. Here the evidence was simply too inconclusive to support its admission given the clear danger of unfair prejudice to petitioner.

The error was compounded by the improper curtailment of cross-examination and the denial of surrebuttal once this new evidence was admitted. The cumulative effect of these errors cannot be deemed harmless beyond a reasonable doubt. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

This case presents an opportunity for this Court to address the question of whether the court properly applied the Rule 403 balancing test when admitting evidence which the prosecutor, the court, and the parties involved had not originally viewed as a crime or wrongful act under Rule 404(b).

C. THE COURTS BELOW FAILED TO MAKE THE REQUIRED FINDINGS WHEN IMPOSING A GUIDELINE SENTENCE FOR OFFENSES WHICH WERE NOT CHARGED, DID NOT RESULT IN CONVICTION, AND WERE NOT THE SUBJECT OF STIPULATION.

Although the Court of Appeals acknowledged that serious errors had occurred when the district court used the environmental offense section to calculate petitioner's offense level and then relied on that environmental offense level to apply the Guidelines multiple-count provisions, the Court declined to remand for recalculation of the sentence given the district court's pronouncement that if its application of the Guidelines were incorrect, the court would have relied on § 5K2.0 to justify departure.

While both the Court of Appeals and the district court repeatedly referred to "environmental offenses" as the basis and justification for the sentence here, at no time did the government or the courts specify which of the city, state or federal regulatory or environmental statutes were deemed to be violated by petitioners. The legality of a sentence based on unspecified environmental offenses, not charged and not the subject of stipulation, should be reviewed. Petitioner received no notice of the specific offenses deemed to trigger the sentencing enhancements by the district court. The district court did not state what statutes it found had been violated or what standard of proof had been used by the court to reach that determination. As a result, the Court of Appeals could not review the appropriateness of the sentence calculation or of any upward departure, the alternative ground for imposing sentence, where these findings were never made.

Guidance on this point is provided by Application Note 15 to § 2F1.1, dealing with fraud offenses, which states that where the underlying offense violated state law, the most analogous guideline was to be applied. However, this inquiry was never undertaken. For example, under state law, environmental offenses are classified by the nature of the prohibited substance involved and the quantity of that substance improperly disposed of. See N.Y. Envir. Conserv. Law §§ 71-2707 to -2717 (McKinney 1984). Without some specification of the statutes and offenses involved, it is impossible to determine whether the sentencing court acted properly when literally adding years to petitioner's sentence.

In an analogous case, Braxton v. United States, 111 S. Ct. 1854 (1991), this Court reversed a sentence based upon a plea stipulation that failed to specifically establish a more serious offense. This Court held that the defendant had been improperly sentenced for the graver offense and his guideline sentence could not stand. Id. at 1858. The same reasoning applies here.

The procedure employed when sentencing petitioner violated his constitutional right to due process. Petitioner's case is one of the first challenges to RICO sentencing under the Guidelines and will certainly be an important precedent. The Court of Appeals opinion improperly invites the district courts to follow a sentencing procedure in violation of the Guidelines.

A writ of certiorari should be issued to review the Court's decision.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1569, 1570, 1571, 1572, 1573,
1574, 1575, 1576, 1603—August Term, 1990

(Argued: June 17, 1991 Decided: November 15, 1991)

Docket Nos. 90-1587, -1588, -1589, -1590, -1591,
-1592, -1593, -1597, -1629

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANGELO PACCIONE, ANTHONY Y. VULPIS, JOHN J. MCDONALD, A & A LAND DEVELOPMENT, STAGE CARTING, INC., AUGUST RECYCLING, INC., NEW YORK ENVIRONMENTAL CONTRACTORS, INC., NATIONAL CARTING, INC., ROSEDALE CARTING, INC., and VULPIS BROTHERS, LTD.,

Defendants-Appellants.

Before:

MESKILL, KEARSE and MCLAUGHLIN,
Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, convicting defendants who engaged in illegal waste disposal operations of mail fraud, 18 U.S.C. § 1341, and RICO violations, 18 U.S.C. §§ 1962 (c) and (d).

Affirmed.

◆

ELLIOTT R. PETERS, Assistant United States Attorney, New York, New York (Roger S. Hayes, Acting United States Attorney for the Southern District of New York, Jeffrey B. Sklaroff, Deirdre M. Daly, David E. Brodsky, Daniel C. Richman, Assistant United States Attorneys, New York, New York, on the brief), *for Appellee.*

NATHAN Z. DERSHOWITZ, New York, New York (Victoria B. Eiger, Dershowitz & Eiger, New York, New York, Alan M. Dershowitz, Amy Adelson, Cambridge, Massachusetts, on the brief), *for Defendants-Appellants Angelo Paccione, A & A Land Development, August Recycling, Inc., National Carting, Inc., and Stage Carting, Inc.*

BARBARA L. HARTUNG, New York, New York (Alan P. Williamson, Morvillo, Abramowitz & Grand, New York, New York, on the brief), *for Defendant-Appellant Anthony Vulpis.*

ROBERT KASANOF, New York, New York (Edward M. Chikofsky, New York, New York, on the brief), *for Defendant-Appellant John McDonald.*

KAREN SILVERMAN, New York, New York (James M. LaRossa, Michael S. Ross, LaRossa, Mitchell & Ross, New York, New York, on the brief), *for Defendants-Appellants Rosedale Carting, Inc. and Vulpis Brothers, Ltd.*

◆

KEARSE, *Circuit Judge*:

Defendants Angelo Paccione, Anthony Y. Vulpis, and John J. McDonald (collectively the "individual defendants"), and defendants A & A Land Development, Stage Carting, Inc., August Recycling, Inc., National Carting, Inc., Rosedale Carting, Inc., and Vulpis Brothers, Ltd. (collectively the "corporate defendants"), appeal from judgments entered in the United States District Court for the Southern District of New York convicting them, following a jury trial before Constance Baker Motley, *Judge*, of racketeering and mail fraud offenses in connection with waste dumping operations. Paccione, Vulpis, and the corporate defendants were convicted of participating and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d) (1988) (counts 1 and 2), and five counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2 (1988) (counts 5-9). Paccione was also convicted on an additional mail fraud count (count

12). McDonald was convicted on one count of mail fraud (count 12). Paccione and Vulpis were sentenced principally to 151 months' imprisonment, to be followed by three-year terms of supervised release; McDonald was sentenced principally to 12 months' imprisonment and ordered to pay a $79,500 fine. In lieu of forfeiture, fines, and restitution, the corporate defendants, Paccione, and Vulpis entered into a court-approved agreement to pay the government $22 million.

On appeal, defendants contend principally (1) that they were deprived of due process by the use of an anonymous jury, (2) that the conduct charged to them was not within the purview of the mail fraud statute, and (3) that the trial court made various evidentiary errors. Paccione and Vulpis also contend that the district court erred in computing their sentences under the federal Sentencing Guidelines ("Guidelines"). For the reasons below, we affirm the judgments of conviction.

I. BACKGROUND

In 1988, much of the private carting business in the New York City boroughs of Brooklyn and Queens was controlled by Paccione and Vulpis. Paccione was the president and majority shareholder of defendants August Recycling, Inc., National Carting, Inc. ("National"), and Stage Carting, Inc. ("Stage") (collectively the "Paccione companies"); Vulpis owned 50% of defendants Rosedale Carting, Inc. ("Rosedale"), and Vulpis Brothers, Ltd. (collectively the "Vulpis companies"). Together, these entities generated income of some $23,000,000 per year. The present prosecution arose principally out of defendants' fraudulent operation in 1988 of an environmentally hazardous landfill on 110 acres of largely undeveloped land on Staten Island, New York. Victims of this fraud included the City of New York ("City") and CSX Realty Corporation ("CSX"). Defendants operated by, *inter alia*, disregarding regulations promulgated by the City's Department of Consumer Affairs and the New York State ("State") Department of Environmental Conservation ("SDEC") and fraudulently obtaining dumping permits from the City's Department of Sanitation ("CDOS") and the City's Department of Transportation ("CDOT"). In addition, certain defendants engaged in a fraudulent scheme with respect to the disposal of infectious medical waste. The evidence presented at the 12-week trial, taken in the light most favorable to the government, revealed the following.

A. *The Illegal Dumping Scheme*

Waste disposal in New York City is subject to stringent regulations adopted primarily in recognition of health and environmental dangers. "Clean waste" or "clean fill," which generally includes clean earth and/or ashes, dirt, concrete, rock, gravel, stone, slag, and sand, is often used to upgrade building sites, and upon obtaining the proper permits, a contractor may dump specified quantities of clean fill on any identified location. For other types of waste, however, the regulations are more restrictive. Private carters seeking to dispose of waste other than clean waste within the City must use a City-owned landfill. The principal City landfill is the Fresh Kills Sanitary Landfill ("Fresh Kills") on Staten Island. Under regulations promulgated by the City and SDEC, carters must pay the City a dumping fee for use of Fresh Kills. From March to October 1988, this fee was $18.50 per cubic yard of putrescible trash and construction or demolition debris; the fee for asbestos, which was classified as hazardous waste and required greater disposal precautions, was significantly higher.

Arlington Yard, a 110-acre former railroad yard located several miles from Fresh Kills, contains the largest undeveloped parcel of real property on Staten Island. Though it still contained some remnants of former rail operations and some small piles of refuse, until mid-1988 Arlington Yard was overgrown with vegetation and trees, attracted wildlife, and was considered suitable for residential development.

In 1988, some 72 acres of Arlington Yard were owned by CSX, an entity headquartered in Virginia. CSX had previously sold two peripheral segments of the Yard to one Kenneth I. Wilpon; the Wilpon parcels were managed by W & W Properties ("W&W"), a partnership formed by Wilpon and Fred E. Weiss, a Staten Island real estate developer. (As discussed in greater detail in Part II.A. below, Weiss, originally named as a defendant in this action, was murdered prior to trial.) In 1988, W&W proposed to CSX that clean fill be placed on their adjoining properties to prepare the land for development. CSX considered the proposal but never gave permission to Wilpon, W&W, or defendants to place any waste, clean or otherwise, on its property.

In the spring of 1988, Paccione and Vulpis formed defendant A & A Land Development ("A&A") and obtained permits from CDOT, CDOS, and SDEC, for the operation by A&A of a clean fill operation on the W&W land. Defendants never had authorization from CSX to use its part of Arlington Yard, and they never sought authorization to dump anything other than clean fill on the W&W portion of the Yard. Nonetheless, from May until mid-September 1988, A&A proceeded to operate a fullscale commercial dump at Arlington Yard, on both W&W and CSX land. Trucks filled with putrescible garbage, construction and demolition debris, medical waste, and asbestos dumped their loads into recently excavated pits. When the pits were filled, more waste material was heaped on, creating a plateau some 20 to 30 feet high. The heap was then covered with a thin layer of the "clean" dirt that had been excavated to create the pits, so that the dump appeared to consist entirely of clean fill.

During the A&A dump's first two months of operations, CSX continued to consider W&W's proposal to put clean fill on CSX property, mistakenly believing that dumping was proceeding only on the W&W land. In June, Paccione mailed CSX a letter falsely reassuring it of the quality of the A&A operation. For example, the letter stated that daily inspections and testing were being conducted; in fact there were no such inspections. Paccione also stated that "[a]ll material delivered to the site comes from various excavation and construction sites"; instead much of the material brought to the site was garbage, medical waste, and asbestos.

CSX executives visited Arlington Yard in late July and only then became aware that a dumping operation was underway on CSX's land. They immediately instructed Paccione, Vulpis, and Weiss in person to cease all dumping on CSX property; CSX gave the same instructions to Wilpon and Weiss by telephone and in writing. In a visit in early August, CSX executives again toured the property; they saw garbage in a pit and smelled foul odors. They repeatedly wrote to Paccione, Vulpis, Wilpon, and Weiss, stating that the dumping on CSX's property was unauthorized. In mid-August, having failed to get defendants to stop using its property, CSX obtained a temporary restraining order barring A&A from CSX's land.

Defendants ignored the restraining order and continued to pile garbage onto its land.

On August 25, 1988, after CDOS investigators had found garbage in one of the pits at the A&A dump, Paccione made numerous misrepresentations to CDOS officials. He falsely stated that all of the dump's employees had strict orders to turn away trucks carrying anything other than clean fill. In fact, his own company's trucks and trucks of the Vulpis companies were daily being allowed to dump their putrescible loads, mixed with hospital waste and asbestos. Paccione stated that a corrupt employee had been responsible for permitting the dumping of the unacceptable material seen by the CDOS inspectors and represented that the employee had been fired as a result of the incident. In fact, the employee he named was never fired but continued to work at the dump until the State eventually closed it down. Paccione also assured the inspectors that the materials A&A accepted were clean and did not contain any demolition materials, "building fill," or rags, representing that 50-100 test samples a week were being taken from incoming loads and analyzed by a laboratory. In fact, no such testing procedure had ever been implemented.

On September 14, 1988, SDEC shut down the A&A landfill operation. The ensuing investigation by City, State, and federal officials revealed asbestos, rotting materials, construction debris, household garbage, and medical waste across the entire Arlington Yard. In all, prior to the shut-down, at least 550,000 cubic yards of refuse had been unlawfully dumped by defendants at the Yard. Much of the garbage deposited at the illegal operation was dumped by the Paccione and Vulpis companies. By dumping at Arlington Yard, these companies avoided paying the approximately $800 per truckload dumping fees that would have been required at Fresh Kills, totaling some $4,625,000. In addition, A&A charged other companies $10 per cubic yard to dump their refuse at the site, considerably less than the $18.50 generally charged by the City at Fresh Kills. In its four months of operation, A&A's dump had revenues of approximately $2.6 million. From these revenues, Paccione received $315,610 in direct weekly payments; Vulpis received $286,728 in direct weekly payments; and McDonald cashed checks totalling $196,565.

As a result of the A&A operation, the City lost the business of the Paccione and Vulpis companies, as well as business from other companies that defendants allowed to dump at the illegal Arlington Yard site. Accordingly, the City experienced a sharp decline in the tonnage of construction waste deposited at Fresh Kills during this period and a concomitant decline in revenue. In addition, CSX's property, which prior to defendants' unlawful dumping had had an estimated value of $20 million based on its potential for residential development, became unusable for that purpose without a clean-up operation costing approximately $15 million. As of the time of trial, the entire extent of the environmental harm done to that property had not yet been ascertained.

B. *The Infectious Medical Waste Scheme*

In addition to the A&A illegal landfill, Paccione and Vulpis, along with McDonald, engaged in an unlawful scheme with respect to the disposal of infectious or "red-bag" medical waste. Throughout the period covered by the indictment, the State had stringent regulations with respect to the disposal of such waste. Haulers of red-bag waste were required, *inter alia*, to be specially licensed by SDEC, to transport the waste in properly licensed and marked vehicles, and to store the waste only in specified locations and only for a limited time. Transfer of permits between companies was not allowed. Beginning in August 1988, SDEC required an applicant for permits to include background information on its individual owners in order to permit SDEC to determine whether those who owned and operated the company had previously committed environmental offenses. In November 1988, the penalties for improper transportation, storage, and disposal of infectious medical waste were increased significantly. Unlike prior statutes, the new red-bag law subjected doctors and medical facilities to potential strict liability if their red-bag waste were mishandled in any way, including civil penalties of up to $50,000 per day and criminal sanctions that included prison terms.

In 1988, Paccione, Vulpis, and McDonald formed defendant New York Environmental Contractors, Inc. ("Environmental Contractors"), for the commercial collection of red-bag and other medical waste. Environmental Contractors began publicizing the new penalties and advertising itself as a properly licensed infectious waste transporter upon which doctors and hospitals could rely to avoid mishandling and liability. It ran full-page advertisements in *The New York Doctor*, a health-related publication, and mailed copies to as many as 1,000 doctors and hospitals. One such advertisement read, in pertinent part, as follows:

IS YOUR MEDICAL WASTE
BEING WASHED UP ON
A BEACH?

YOU COULD BE PROSECUTED !

Let Us Handle Your Waste Problems:
New York State Licesnsed . . . .
. . . .

BE SAFE, BE SURE, USE

NEW YORK
ENVIRONMENTAL CONTRACTORS, INC.
. . . .

(Emphasis in original.) Vulpis and McDonald also mailed leaflets to prospective clients explaining the new civil and criminal penalties for improper disposal of infectious waste and describing how Environmental Contractors would comply with all of the rules and regulations governing the disposal of such waste. The leaflets maintained, *inter alia*, that

> N.Y. Environmental Contractor's Corporation is fully insured and licensed to handle the collection, transportation and disposal of . . . infectious material. . . .
>
> Our organization was established with the moral and ethical convictions to [*sic*] proper handling of infectious waste removal and that it is to be managed is [*sic*] a safe and non-hazardous manner. These convictions lead us in our decisions to maintain rigid and concise measures in the removal and disposal of infectious waste material. Our company has trained personnel who are health orientated [*sic*] and envi-

> ronment conscious. We are deeply committed to obtaining a non-hazardous-environment, where infectious waste removal and disposal is involved.

Contrary to its representations, Environmental Contractors was neither properly licensed, nor ethical, nor competent. All of its permits were either bogus or obtained by forgery and fraud. It fabricated its first SDEC infectious waste transporter "permit" by pasting the name "New York Environmental Contractors" onto a permit previously issued to August Recycling, Inc. Environmental Contractors then mailed copies of this document to several doctors who had asked to see its permit before hiring the company. When Environmental Contractors submitted an application to obtain its own first SDEC transporter permit, McDonald forged the signature of a Pennsylvania incinerator manager supposedly certifying that the incinerator had agreed to accept Environmental Contractors's infectious waste for disposal. In October 1988, when Environmental Contractors was applying to SDEC for an amended permit, though McDonald, Paccione, and Vulpis had represented to banks and other regulatory bodies that they each owned one-third of Environmental Contractors, McDonald represented in the application that he was the sole owner of the company, presumably to conceal the financial interests of Paccione and Vulpis who were then under investigation for their roles in the A&A dump.

Environmental Contractors's operations were no better than its acquisition of permits. For example, on September 16, 1988, SDEC officer James Milewski saw a Vulpis company truck parked outside of National in a commercial and residential area. Though the truck was not authorized on any SDEC permit to transport infectious medical waste, it contained improperly unmarked barrels of infectious waste and 245 boxes of such waste. This waste, which Environmental Contractors had collected from its customers and had transferred to the truck, included blood vials and human organs. The truck did not have the required warnings posted on its exterior to indicate that it contained infectious waste; it had been parked in front of National for some two weeks, though the regulations permitted storage for no more than five days; and because of its failure to properly contain the waste, it was leaking blood onto the pavement.

Environmental Contractors's last SDEC permit expired on March 31, 1989, but the company continued to collect and dispose of infectious waste without a permit. From February until June 1989, Environmental Contractors operated out of a transfer station belonging to All County Sanitation, a company owned by Vulpis in Long Island City, New York, where infectious waste was stored for as long as two months. This facility was not authorized by SDEC to serve as an infectious waste storage facility.

Each of Environmental Contractors's violations of the state regulatory scheme in September 1988 and during the early months of 1989 exposed to legal sanctions the persons who had generated the waste found in Environmental Contractors's possession. Several of these persons or entities were required to pay civil penalties.

C. *The Verdicts and the Sentences*

Based on the A&A dumping operation and the Environmental Contractors medical waste collection operation, a 12-count superseding indictment charged all defendants with a substantive RICO violation, to wit, conducting and participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (count 1); and with RICO conspiracy, in violation of 18 U.S.C. § 1962(d) (count 2). It charged all defendants except McDonald and Environmental Contractors with five counts of scheming to defraud the City of dumping revenues and license fees in connection with the A&A dump site, in violation of the mail fraud statute, 18 U.S.C. § 1341 (counts 3-7), and with two counts of scheming to defraud CSX of the value of its Arlington Yard property through the A&A dumping operations, also in violation of § 1341 (counts 8 and 9). Counts 10 and 11 charged Paccione and Vulpis, along with their "co-racketeers" and certain of their respective companies, with schemes to defraud certain hospitals in connection with the disposal of infectious or medical waste, in violation of 18 U.S.C. §§ 1341 and 2. Finally, the indictment charged that Paccione, Vulpis, McDonald, and Environmental Contractors had schemed to defraud their medical customers of money and property by charging them high rates attributable to lawful transport, storage, and disposal of medical waste without providing those services lawfully, and had implemented that scheme through, *inter alia*, mailings of letters and invoices to a certain doctor, in violation of § 1341 (count 12). The alleged schemes to defraud also formed the basis for 17 RICO predicate acts charged in counts 1 and 2.

The trial lasted 12 weeks. The jury, empaneled anonymously over defendants' objections, deliberated from May 22 to June 8, 1990, and found each of the defendants guilty on some counts and not guilty on others. All of the defendants charged in counts 3, 4, 10, and 11 were acquitted on those counts. In addition, the jury found McDonald and Environmental Contractors guilty on count 12 but not guilty on counts 1 and 2. It found Vulpis guilty on counts

1, 2, and 5-9, but not guilty on count 12. It found Paccione guilty on counts 1, 2, 5-9, and 12. It found the corporate defendants guilty on counts 1, 2, and 5-9. With respect to the RICO counts, as discussed in greater detail in Part II.C. below, the jury also completed a special verdict form, making findings on each of the alleged predicate acts.

On June 8, 1990, the district court approved the parties' June 6, 1990 letter agreement with respect to forfeitures under RICO ("forfeiture agreement"). That agreement principally removed from the jury any issue of RICO forfeitures and provided that Paccione, Vulpis, and the corporate defendants, if convicted of RICO offenses, would be jointly and severally liable to the government for $22 million, in satisfaction of forfeiture, court-imposed fines, and restitution. The forfeiture agreement established a periodic payment schedule and required that those defendants pay the government in full within 90 days. No payments were made.

On October 3, 1990, the district court sentenced Paccione and Vulpis principally to 151-month terms of incarceration, and sentenced McDonald principally to a 12-month term of incarceration and ordered him to pay a fine that later was reduced by stipulation to $79,500. For reasons discussed in greater detail in Part III.B. below, the sentences imposed on Paccione and Vulpis were more severe than those recommended in the Probation Department's Presentence Reports, in part because the district court found that Paccione and Vulpis had entered into the forfeiture agreement with intent not to perform.

D. *The Present Appeals*

On appeal, defendants challenge their convictions on procedural and substantive grounds. In addition, Paccione and Vulpis challenge their sentences. For the reasons below, we affirm the judgments of conviction of Paccione, Vulpis, McDonald, and the corporate defendants.

We also note that Environmental Contractors, though it filed a notice of appeal, did not file a brief or otherwise pursue its appeal. Accordingly, its appeal is dismissed.

II. CHALLENGES TO THE CONVICTIONS

Defendants challenge their convictions on the principal grounds that (1) the use of an anonymous jury deprived them of a fair trial, (2) the conduct charged to them was not within the reach of the mail fraud statute, (3) the evidence to support the mail fraud counts was insufficient, and (4) the inapplicability of the mail fraud statute invalidated the predicate acts on which the RICO convictions were premised. In addition, McDonald contends that the court erred in refusing to give a requested jury instruction; he and Vulpis challenge certain of the court's evidentiary rulings; and the Vulpis companies contend that they may not properly be held accountable for crimes committed by Vulpis. For the reasons below, we conclude that these challenges to the convictions lack merit.

A. *The Anonymous Jury*

Upon motion of the government, the district court entered an order (a) limiting the voir dire so as not to disclose the name, address, or place of employment of any member of the venire, (b) keeping the jurors together during lunch recesses, accompanied by a United States Marshal, and (c) having the jurors transported at the end of each trial day to an undisclosed central location from which they could go home. Defendants consented to most of these measures, on condition that the jurors be carefully instructed that the procedures adopted were intended as protection against intrusion by the media; but they objected that the nondisclosure of the jurors' names and employers would deprive them of a fair trial. They pursue this contention on appeal. We are unpersuaded.

In general, the court should not order the empaneling of an anonymous jury without (a) concluding that there is strong reason to believe the jury needs protection, and (b) taking reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected. *See, e.g., United States v. Tutino*, 883 F.2d 1125, 1132 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1139 (1990); *United States v. Persico*, 832 F.2d 705, 717-18 (2d Cir. 1987), *cert. denied*, 486 U.S. 1022 (1988); *United States v. Thomas*, 757 F.2d 1359, 1365 (2d Cir.), *cert. denied*, 474 U.S. 819 (1985). Within these parameters, the decision whether or not to empanel an anonymous jury is left to the district court's discretion. *See, e.g., United States v. Maldonado-Rivera*, 922 F.2d 934, 971 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2858 (1991).

Sufficient reason for empaneling an anonymous jury has been found to exist where, for example, the defendants "were alleged to be very dangerous individuals engaged in large-scale organized crime who had participated in several 'mob-style' killings," and there was "strong evidence of defendants' past attempts to interfere with the judicial process, and defendants were alleged to be part of a group that possessed the means to harm jurors," *United States v. Thomas*, 757 F.2d at 1364-65; or where the defendants have been charged with grand jury tampering and the trial is expected to attract publicity, *United States v. Vario*, 943 F.2d 236, 240 (2d Cir. 1991); *United States v. Persico*, 832 F.2d at 717 (warranted by history of violence and willingness to corrupt and obstruct justice, together with expectation of extensive publicity); or where the defendant has a history of attempted jury tampering and a serious criminal record, *United States v. Tutino*, 883 F.2d at 1132-33; or where there had been extensive pretrial publicity and there were abundant allegations of dangerous and unscrupulous conduct, *United States v. Barnes*, 604 F.2d 121, 141 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

Where jury anonymity is warranted, we have found the defendant's fundamental right to an unbiased jury is adequately protected by the court's conduct of " 'a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself.' " *United States v. Vario*, 943 F.2d at 242 (quoting *United States v. Barnes*, 604 F.2d at 140). In addition, we have found the danger that the jury might infer that the need for additional security was attributable to the character of the defendant was minimized where the court took care to give the jurors a plausible and nonprejudicial reason for not disclosing their identities or for taking other security measures. *See United States v. Thomas*, 757 F.2d at 1364-65 & n.1 (explained as protection against pressures from media); *United States v. Maldonado-Rivera*, 922 F.2d at 971 (same).

In the present case, the government's motion expressed concern that, in light of the serious nature of the charges and the potential for long prison terms and high monetary penalties, defendants might seek to influence the outcome of the prosecution by improper means. An affirmation served with the motion stated, *inter alia*, that W&W's

Weiss, named as a defendant in the indictment, had been murdered in circumstances that strongly suggested a connection to the present case and to certain of these defendants. It stated that based on public information and on confidential information from a reliable source, the government believed that Paccione was a "made" member of the Gambino Crime Family; that Vulpis was believed to have strong ties to organized crime; that various persons had been threatened by Vulpis and his associates with a baseball bat or a pistol; and that a government witness had recently received a middle-of-the-night anonymous telephone call telling him that he would be safe so long as he " 'remembered nothing.' " The government also pointed out that the case had been front-page news and that the trial could be expected to be the subject of extensive publicity, exposing the jurors to inappropriate contacts that could compromise the trial. An additional affirmation, submitted to the court *ex parte* and *in camera* because of an ongoing grand jury investigation and the potential danger to witnesses who had testified before that body, provided details as to the gangland style of the Weiss killing and other details supporting the government's assertions as to the circumstances surrounding the killing, defendants' ties to organized crime, and the probability that that murder had been arranged by one or more of the defendants. The presentation by the government was sufficient to warrant the district court's conclusion that jury anonymity should be preserved.

We see no inadequacy in the procedural precautions taken by the court to prevent prejudice to the defendants as a result of the anonymity of the jurors. Defendants do not contend that the voir dire was in any way inadequate. The court also adequately instructed the jury at the outset of the trial that the special precautions were designed to protect the jury from contacts by the media, thereby implying that the security measures were not the result of threats from the defendants. Though there was evidence that some of the jurors were apprehensive about possible threats from defendants, defendants have not shown any basis for believing they were prejudiced by the court's security measures. To the contrary, the fact that the jury acquitted each of the defendants on several counts strongly indicates that those measures did not induce any lack of objectivity.

In sum, we find no abuse of discretion in the district court's decision to keep confidential the jurors' names and places of employment.

B. *The Mail Fraud Convictions*

The federal mail fraud statute prohibits the use of the mails in furtherance of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that § 1341 is "limited in scope to the protection of property rights." *Id.* at 360. Though the statute reaches a scheme to obtain either tangible or intangible property rights, *see Carpenter v. United States*, 484 U.S. 19, 25-28 (1987) (confidential information protected), it does not reach a scheme designed merely to deprive the citizenry of honest government, *McNally*, 483 U.S. at 356. In the wake of *McNally*, this Court has considered the status of federal and state licenses under § 1341 and under 18 U.S.C. § 1343 (1988), its wire fraud analogue. In *United States v. Schwartz*, 924 F.2d 410 (2d Cir. 1991) ("*Schwartz*"), we concluded that an arms export license in the hands of the federal government is not property, and that the government's interest in such a license "is ancillary to its power to regulate, and [therefore] is not a property interest within the meaning of the wire fraud statute." *Id.* at 418. On the authority of *Schwartz*, we decided in *United States v. Novod*, 923 F.2d 970, 973 (2d Cir. 1991) ("*Novod*"), *cert. denied*, 111 S. Ct. 2018 (1991), a mail fraud case, that a state's interest in issuing permits to operate a dump site did not constitute property.

Defendants in the present case contend principally that the schemes of which they were accused are not within the reach of § 1341 because those schemes depended on the issuance of State and City licenses, and that defendants' procurement of such licenses, even if by means of misrepresentation and use of the mails, did not, according to *Schwartz*, deprive the City and State of property. Although, as discussed in Part II.C. below, this argument has merit with respect to one of the predicate acts charged in the RICO counts, it has no merit with respect to defendants' convictions on the mail fraud counts.

The decisions in *Schwartz* and *Novod* must be read in light of the postures in which those cases arrived in this Court on appeal. In each, we reversed wire or mail fraud convictions because the trial court had instructed the jury that the government's right to control the issuance of its licenses was a property right. For example, though in *Schwartz* the government argued on appeal that the fraudulent procurement of the arms license had deprived the United States of property because it lost the right to seize the arms, the jury had been instructed only on the theory that the license itself was property. In *Novod*, the government had alleged that the fraudulent scheme was designed not only to obtain a state permit but also to defraud the state and its residents of funds necessary to clean a dump site and to defraud the federal and state governments of taxes; but the trial court had instructed the jury that it could convict on the basis of the first objective alone, *i.e.*, that it could convict if it found that the purpose of the scheme at issue was to obtain a dumping permit, because "as a matter of law the permit constitutes property." Neither of our decisions held that fraudulent procurement of a permit or license in order to deprive the issuing authority of money or other pecuniary interests was not within the wire or mail fraud statutes. Consistent with the boundaries of *Schwartz* and *Novod*, we have held that fees payable to the government for services or for tax purposes do constitute property for purposes of the fraud statute. *See, e.g.*, *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (scheme to deprive state of income taxes cognizable under § 1341); *United States v. Porcelli*, 865 F.2d 1352, 1359-62 (2d Cir.) (same re state sales tax), *cert. denied*, 110 S. Ct. 53 (1989); *United States v. Gelb*, 881 F.2d 1155, 1162 (2d Cir.) (same re postal revenue from mass mailings), *cert. denied*, 110 S. Ct. 544 (1989); *accord United States v. Dray*, 901 F.2d 1132, 1141-42 (1st Cir.) (scheme to evade legally required fees for municipal building permits actionable as mail fraud), *cert. denied*, 111 S. Ct. 245 (1990).

There is no indication in the present case that the mail fraud counts were presented to the jury on an improper basis. In instructing the jury on these counts, the court told the jury generally that it must find

> [t]hat at some point during the time period alleged in the charge, there existed a scheme to obtain money or property by means of false or fraudulent pretenses, representations or promises. . . .
>
> . . . .

> The first essential element that must be established to warrant conviction of the defendants under the mail or wire fraud counts or a finding of guilty for the racketeering acts of mail . . . fraud is that there existed, with respect to each count or act, a scheme or artifice to obtain money or property . . . .
>
> . . . .
>
> Let me emphasize that the mail fraud statute is limited to the protection of money or property rights. Thus, it would not be sufficient for conviction under these statutes that defendants sought to deprive someone of intangible rights, such as the right of a city or State government agency to have citizens obey its regulations.

(Trial Transcript, May 21, 1990, at 7056-57.) The instructions as to specific mail fraud counts similarly focused on the victims' monetary interests. For example, with respect to counts 5-7, the court stated:

> Here, the government charges several different schemes to defraud:
>
> 1. A scheme, in Racketeering Acts 1 and 2 and Counts Three to Seven, to defraud the City and State of revenues *from licensing fees and dumping fees* to be derived from the disposal of waste materials at the City-owned landfill at Fresh Kills.

(Trial Transcript, May 21, 1990, at 7057 (emphasis added).) There was no suggestion to the jury that it was allowed to convict defendants of mail fraud on the basis that the City and State permits were themselves property.

As discussed below, there was ample evidence to support all of defendants' mail fraud convictions.

1. *Counts 5-7: Defrauding the City of Revenues*

Counts 5, 6, and 7 of the indictment charged Paccione, Vulpis, and the corporate defendants with use of the mails in furtherance of

> a scheme and artifice to defraud the City of New York of money and property, to wit, revenues from licensing fees and dumping fees to be derived from the lawful disposal of waste materials at the City-owned landfill at Fresh Kills.

In support of these counts, the government presented evidence that, by fraudulently procuring permits to deposit clean fill on the W&W property and using those permits to mask their dumping of nonclean waste—including putrescible garbage, building demolition debris, medical waste, and asbestos—in Arlington Yard, both on their property and on the CSX property, defendants deprived the City of the dumping fees to which it was entitled. In addition to lowering their own dumping costs, defendants allowed other companies to dump their nonclean waste in Arlington Yard and charged them $10 per cubic yard. The total amount of waste illegally dumped in Arlington Yard was some 550,000 cubic yards. Since the only other sizeable dump in the City was Fresh Kills and the prevailing dumping fee there during the pertinent period was $18.50 per cubic yard (and significantly higher for asbestos), the defendants' frauds cost the City more than $10 million in licensing fees. Even if one were to accept defendants' argument that some licenses were acquired that permitted the dumping of some 340,000 cubic yards of clean fill, the net loss to the City, considering the total amount dumped in Arlington Yard, was several million dollars.

Defendants make two additional arguments with respect to counts 5-7 that need not detain us long. First, they contend that the government's proof of mailing under counts 5 and 6 was insufficient because the alleged mailings (consisting of permits applied for by A&A) were from CDOT to CDOS, and defendants had not been informed that such mailings would occur. To come within § 1341, however, a mailing need not be by the defendant himself, so long as it was reasonably foreseeable by the defendant and furthered his fraudulent scheme. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954); *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). There can be no serious doubt that both of these requirements were met here.

Second, defendants argue that the City failed to prove any cognizable loss of dumping fees because defendants had no obligation to dump at Fresh Kills. We are unpersuaded. Fresh Kills was the largest dump site in the City. Defendants and other companies that used the A&A illegal dump site had previously dumped at Fresh Kills, and the government presented evidence showing that City revenues from that facility declined precipitously during the time of operation of the A&A dump. It was within the province of the jury to consider these facts, as well as the additional expense that would have been incurred by carters traveling to dump outside of the City, and to infer that defendants' conduct cost the City fees it would otherwise have received.

2. *Counts 8 and 9: Defrauding CSX of the Value of Its Land*

Counts 8 and 9 charged Paccione, Vulpis, and the corporate defendants with use of the mails to conceal from CSX the fact that defendants were causing vast amounts of garbage, asbestos, and medical waste to be dumped on CSX's property, thereby depriving CSX of the value of that property. *See, e.g., United States v. Angelilli*, 660 F.2d 23, 36-37 (2d Cir. 1981) (cognizable fraud where mailings of payments to investors victimized by scheme lulled them into false sense of security), *cert. denied*, 455 U.S. 945 (1982). Defendants' argument that their convictions on counts 8 and 9 should be overturned on the ground that "[u]nder *McNally*, . . . a scheme to damage a person's property is not a scheme to defraud him within the meaning of" the mail fraud statute (brief on appeal of Paccione, *et al.*, at 50), is frivolous. Defendants schemed to conceal from CSX their dumping of noxious wastes on its land and mailed letters to CSX containing fraudulent statements to achieve that end. Prior to defendants' dumpings, the CSX property had an estimated value for residential purposes of $20 million; after their acts, it had no value for that purpose without a clean-up expenditure of some $15 million. There can be no doubt that defendants schemed to and did deprive CSX of the value of its property, using the mails in furtherance of their scheme. This conduct was within the purview of § 1341.

3. *Count 12: The Medical Waste Disposal Scam*

Paccione and McDonald contend that their count 12 mail fraud convictions should be set aside principally on the grounds that (1) the medical waste scheme merely deprived Environmental Contractors's customers of an intangible right, *i.e.*, "the right to the honest services of the defendants in dumping their medical waste in a permitted site listed on defendant's waste transporter permit" (McDonald brief on appeal at 30), and hence was not actionable under § 1341 in light of *McNally* and *Schwartz*; (2) the mailings charged, "having occurred afterward" and being "incidental," were not in furtherance of a scheme to defraud; and (3) there was no evidence of any intent to defraud. Their contentions are untenable.

Count 12 charged that these defendants used the mails in order

> to defraud doctors, which [*sic*] generated medical and infectious waste materials of money and property by charging them the high rates required for lawful transfer, storage and disposal of such waste, while actually transferring, storing and disposing of the waste at far lower rates illegally, and by exposing the generators to potential civil and criminal penalties for illegal transfer, storage and disposal of such waste.

That count alleged that defendants caused the mailings of letters and invoices to one Dr. Vado, who had engaged the waste disposal services of a company other than Environmental Contractors, which had in turn hired Environmental Contractors.

Use of the mails in furtherance of a scheme to offer services in exchange for a fee, with the intent not to perform those services, is within the reach of § 1341. *See, e.g., McNally*, 483 U.S. at 360 (fraud cognizable where alleged victim would have paid less or received better quality services absent the alleged deceit); *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991) ("providing alternate services does not defeat a fraud charge [when] the [victims] did not receive the services that they believed were being provided"); *cf. Schwartz*, 924 F.2d at 420-21 (use of wire facilities in connection with defendants' false assurances to its arms supplier that defendants were in compliance with government regulations was within reach of § 1343).

There is no requirement that the victim of the fraud be deceived by the very document that satisfies the statute's mailing requirement; rather, the requirement is merely that the mailing be "in furtherance of" the fraud. *Novod*, 923 F.2d at 973; *United States v. Bronston*, 658 F.2d at 927. Nor is there any requirement that the mailings precede the fraud. *United States v. Sampson*, 371 U.S. 75, 79-80 (1962). The mailing of communications that are designed to lull the victims of the fraud into believing they have received the services they bought is sufficient to support a conviction under § 1341. *See, e.g.*, *United States v. Angelilli*, 660 F.2d at 36-37 (fraud cognizable where mailings of payments to victimized investors lulled them into false sense of security).

The conduct of Paccione and McDonald fits comfortably within this framework. The fraud in obtaining permits to dispose of infectious waste was a part of the deceit employed to allow defendants to pursue a scheme that was clearly cognizable under § 1341. Environmental Contractors offered to provide doctors with infectious-waste disposal services that would be safe and adequate to relieve them of the risk of civil and criminal liability. There was no indication that any of its customers sought a lower level of service, and it was inferable that the payments of the doctors and medical facilities were to be commensurate with the high level of services promised by Environmental Contractors. Environmental Contractors mailed invoices designed to lull the customer into believing the services promised had been provided.

Defendants' reliance on cases such as *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970), and *United States v. Starr*, 816 F.2d 94, 99 (2d Cir. 1987), is misplaced. In the former, though the defendants had made false representations in order to gain access to potential customers, they had not misrepresented either the quality of their merchandise or the conditions of sale. In *Starr*, the defendants, who operated a bulk mailing service and were indicted for defrauding their customers, charged their customers the correct price for postage but cheated the Postal Service by "burying" higher-rate mail in sacks being used for lower-rate mail. Because the customers received the same postal service they would have received had defendants paid the full postage, the mail fraud conviction was reversed on the ground that the customers had not been defrauded. Though the Postal Service itself had been victimized, the indictment charged only that the defendants had defrauded their customers, not that they had defrauded the Postal Service.

Here there is no question that Environmental Contractors's customers did not get what they paid for. Its customers were led to believe they were purchasing careful, competent, and licensed services, together with a reduction of the risk of civil and criminal penalties for improper disposal. Instead Environmental Contractors frequently and flagrantly violated numerous SDEC regulations; its customers were exposed to substantial regulatory risks, and even had those risks not come to fruition, the fraud was complete. These customers had also requested assurance at the outset that the company was in fact licensed to handle infectious medical waste; Environmental Contractors was not so licensed and responded by sending a permit it had counterfeited; and when it did acquire its own permits, it did so by means of forgery and fraud. Defendants' suggestion that there was no evidence of an intent to defraud is frivolous.

C. *The RICO Convictions*

Paccione, Vulpis, and the corporate defendants contend that their RICO convictions should be set aside on the ground that some of the alleged mail frauds listed as predicate acts were not within the reach of the mail fraud statute. We have dealt with most of the mail frauds above, and since we have found that they were within the scope of § 1341, there is no basis for challenging their use as RICO predicate acts. One alleged predicate act, however, was flawed as defendants contend.

Racketeering predicate act 12 (not to be confused with *count* 12) charged that the individual defendants and Environmental Contractors violated § 1341 by using the mails "to defraud the State of New York of money and property by awarding a lucrative waste transporter permit to [Environmental Contractors]." Notwithstanding its reference to money and property, this allegation treated the license itself as the property of which the State was defrauded. As the government concedes on appeal, this was invalid under *Schwartz* and *Novod*. Since this allegation was insufficient to charge an offense under § 1341, it was also insufficient to serve as a mail-fraud RICO predicate act.

This deficiency, however, does not require reversal. The jury returned a painstaking special verdict in which it made findings as to each of several defendants with respect to 17 alleged predicate acts (many with subparts). Of the defendants found guilty on the RICO counts, only Paccione was found by the jury to have committed predicate act 12, and thus only he has standing to challenge his RICO conviction on the ground that predicate act 12 was insufficient. We reject Paccione's challenge because, for the reasons below, we conclude that the error in submitting act 12 to the jury was harmless beyond any reasonable doubt, *see* Fed R. Crim. P. 52(a); *Chapman v. California*, 386 U.S. 18, 24 (1967).

In addition to predicate act 12, the jury found that Paccione had committed eight predicate acts, to wit, acts 1, 3, 4, 13, 14, 15, 16, and 17. These eight remaining predicate acts, which suffer no defects, are an ample basis for Paccione's convictions on the RICO counts. We recognize that the mere fact that a jury finds that a given defendant committed three or more predicate acts does not necessarily mean that it will convict that defendant of RICO charges—witness the fact that the jury in this case found McDonald not guilty on the RICO counts though it found that he had committed six of the alleged predicate acts (acts 12-17). But this treatment of McDonald gives us no basis for believing the jury might have found Paccione not guilty on the RICO counts if predicate act 12 had not been submitted to it. Rather, the jury's findings show that predicate act 12 simply was not an ingredient in its RICO verdicts. Thus, the jury found McDonald had committed that act, but it acquitted him on the RICO charges; it found Vulpis had not committed predicate act 12, but it convicted him on the RICO charges; and the corporate defendants were not alleged to have committed predicate act 12, and the jury convicted them on the RICO counts. The RICO convictions of Vulpis and the corporate defendants were based on the jury's findings that they committed predicate acts 1, 3, and 4, and no other predicate acts. Given all of these findings and verdicts, including the jury's finding that Paccione too committed predicate acts 1, 3, and 4 (plus five other validly submitted acts), we have no doubt that the jury would have convicted him on the RICO counts if predicate act 12 had not been submitted.

D. *Individual Challenges to the Convictions*

Defendants make a number of individual challenges to their convictions, including (1) Vulpis's challenge to the introduction of evidence that he attempted to bribe SDEC investigators, (2) the Vulpis companies' contention that they were not responsible for derelictions of Vulpis, and (3) McDonald's contentions that the trial court erred in refusing to give a requested jury instruction and erred in certain evidentiary rulings with respect to character evidence. We have considered all of defendants' challenges to the merits and find in them no basis for reversal.

1. *Vulpis*

During its rebuttal case, the government was allowed to introduce evidence that, in connection with the illegal A&A landfill, Vulpis had offered SDEC officers bribes. Vulpis challenges the admission of this evidence, arguing principally that it was not probative of the issues at trial, that the unfair prejudice to him outweighed its probative value, and that he did not have proper notice that the evidence would be offered. We disagree.

Under Rule 404(b) of the Federal Rules of Evidence, relevant evidence of "other crimes, wrongs, or acts" may be admitted at trial to show, *inter alia*, that a defendant who claims that his conduct was the result of accident or mistake had the intent to commit the offense. *See* Fed. R. Evid. 404(b); *see, e.g., United States v. Mills*, 895 F.2d 897, 907 (2d Cir.), *cert. denied*, 110 S. Ct. 2216 (1990); *United States v. Caputo*, 808 F.2d 963, 968 (2d Cir. 1987). A defendant's attempt to bribe a law enforcement official is relevant to show his awareness that his actions were not innocent. *See, e.g., United States v. Ochs*, 595 F.2d 1247, 1260 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979); *see also*

United States v. Mendez-Ortiz, 810 F.2d 76, 78-79 (6th Cir. 1986) (attempt to bribe witness), *cert. denied*, 480 U.S. 922 (1987). Evidence of such "other acts" should be excluded, however, if the trial court finds that its potential for unfair prejudice substantially outweighs its probative value. *See* Fed. R. Evid. 403; Fed. R. Evid. 404(b) Advisory Committee Note; *Huddleston v. United States*, 485 U.S. 681, 687-88 (1988). The trial court's decision to admit such evidence will be reversed only for a clear abuse of discretion. *See, e.g., United States v. Sappe*, 898 F.2d 878, 880 (2d Cir. 1990); *United States v. Caputo*, 808 F.2d at 968.

Vulpis's principal defense at trial was that he did not intend the Arlington Yard operations to violate the law and that any impermissible dumping there was the result of accident or mistake. To substantiate that defense he was allowed, over the government's objection, to introduce testimony that Weiss had given in a civil action. In that testimony, Weiss said that when two SDEC officers discovered buried garbage at the landfill Vulpis had been "shocked" and "surprised." In response to this evidence, the government was permitted, in its rebuttal case, to offer testimony by those two officers that upon their calling the violations to Vulpis's attention, Vulpis had promptly offered them money. Accordingly, SDEC Lieutenant David Baker testified about his visit to the A&A landfill in mid-September 1988 and a conversation he had there with Vulpis. When Baker told Vulpis he was operating illegally and risking $25,000 a day in penalties, Vulpis responded, "I'm losing $75,000 a day every day the place is closed. How about $100,000, you just go away." Similarly, SDEC officer Milewski testified that on the same day, Vulpis told him he was "losing approximately $80,000, and how about $50,000." These statements by

Vulpis, which the jury was plainly free to interpret as offering bribes, were relevant to show a consciousness of guilt on the part of Vulpis and thereby to cast doubt on his lack-of-intent defense. The court properly gave the jury a limiting instruction, and it was well within the court's discretion to conclude that, with that instruction, the probative value of this evidence outweighed its potential for unfair prejudice.

Finally, we reject Vulpis's contention that the bribe evidence should have been excluded because he did not have advance notice that the government would seek to use it. In support of this contention, Vulpis relies on *United States v. Davidoff*, 845 F.2d 1151 (2d Cir. 1988). His reliance is misplaced, for *Davidoff* did not involve a Rule 404(b) question; rather, we ruled that it was error for the trial court not to require the government to provide a bill of particulars identifying the alleged victims of discrete extortionate schemes that the government intended to prove as RICO predicate acts. *See* 845 F.2d at 1154. A requirement that, upon request of the defendant in a criminal case, the government give advance notice of the general nature of any other-act evidence that is to be offered at trial will soon be added to Rule 404(b). *See* Fed. R. Evid. 404(b) (effective Dec. 1, 1991: evidence of other acts is admissible to prove, *inter alia*, absence of mistake or accident, "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial"). No such requirement was in effect, however, at the time of the trial in the present case. *See generally* 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404[19], at 404-158 (1991) ("Rule 404 does not require the government to give notice of an intention to use other crimes evidence at trial.").

In any event, even if Vulpis had been entitled to advance notice that the government would offer the bribe evidence against him, he received adequate notice. The evidence was introduced during the government's rebuttal case. The government had initially offered this evidence, on another theory, during its direct case; when it was rejected, the government pointed out that if the testimony were viewed as reflecting the offer of a bribe, it would be admissible under Rule 404(b) as other-act evidence to meet a defense of mistake or lack of intent; the government expressly reserved its right to offer the testimony on rebuttal. The district court was not required to exclude the bribery evidence on the ground that Vulpis had not received notice.

2. *The Vulpis Companies*

The Vulpis companies contend that the jury's verdict finding them guilty on counts 1, 2, and 5-9 was not supported by sufficient evidence because the only evidence linking them to the A&A illegal operation was the fact they were 50% owned by Vulpis. They contend that they could not properly be held liable for his actions because there was no evidence that they had conferred any authority on him to involve them in the A&A landfill. This contention need not detain us long.

A corporation can act only through its agents, and the "acts of individuals on [the corporation's] behalf may be properly chargeable to it." *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983). Thus, the corporation may be held criminally liable "for the conduct of its supervisory employees who had either intentionally disregarded the law or had acted with plain indifference to its requirements." *United States v. Demauro*, 581 F.2d 50, 54 (2d Cir. 1978).

The evidence in the present case was sufficient to permit a rational juror to infer beyond a reasonable doubt that Vulpis's actions with respect to the A&A dump were for the benefit of and authorized by Rosedale and Vulpis Brothers, Ltd. It included proof that Vulpis owned 50% of each company; that he was an officer of each corporation; and that he largely ran their operations. Vulpis entered into the A&A partnership with Paccione for the purpose of operating the illegal dump. Vulpis helped run the dump. Truck drivers for both of Vulpis's companies testified that they daily made numerous dumps in Arlington Yard without being required to pay a fee. Use of that dump saved the Vulpis companies millions of dollars.

In short, the evidence was ample to support the convictions of the Vulpis companies on the RICO and mail fraud counts with which they were charged.

3. *McDonald's Contentions*

McDonald contends that the trial court erred in refusing to give a requested instruction to the jury and in making certain evidentiary rulings, to wit, barring McDonald's character witnesses from testifying with respect to his relationship with his son and allowing other witnesses to be questioned hypothetically with respect to McDonald's commission of crimes. For the reasons below, we find no basis for reversal.

a. *The Requested Instruction*

McDonald asked the trial court to charge the jury that defendants' representations that Environmental Contractors was licensed to deal with infectious medical waste were not fraudulent because defendants relied in good faith on the permits they possessed. Thus, he requested the court to instruct that "whether or not" Environmental Contractors's licenses were "fraudulently or irregularly obtained," advertisements describing the company as being licensed "w[ere] not false" and that defendants were "entitled to describe" Environmental Contractors "as licensed." McDonald contends that the trial court's refusal to give this instruction was error. It was not.

The trial judge is not required to give a requested charge if it lacks a foundation in law, *see, e.g., United States v. Tillem*, 906 F.2d 814, 828 (2d Cir. 1990); *United States v. Ouimette*, 798 F.2d 47, 49 (2d Cir. 1986), *cert. denied*, 488 U.S. 863 (1988), or lacks a foundation in the evidence adduced at trial, *see United States v. Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976). Where the defendant requests a charge as to his defense of good faith, there is no basis for reversal where the court's instructions have properly explained the thrust of that defense. *See, e.g., United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *see also Cheek v. United States*, 111 S. Ct. 604, 611 (1991) (in criminal tax case, trial court should not instruct jury that, in order to negate willfulness, defendant's belief that enforcement of tax laws was unconstitutional must be objectively reasonable).

Here, the court gave the essence of a proper good-faith defense in its jury charge, stating as follows:

> Under the antifraud statutes, even false representations or statements or omissions of material fact do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, no matter how inaccurate the statements may turn out to be.

(Trial Transcript, May 21, 1990, at 7069-70.) This general instruction was sufficient. The record did not warrant a charge, as McDonald requested, that the individual defendants were entitled to describe Environmental Contractors as licensed. At the outset, Environmental Contractors represented that it was licensed when it was not. When doctors asked to see its license, defendants simply took another company's license and pasted Environmental Contractors's name on it, and distributed copies of the fabricated document. As a matter of law, defendants could not have had a good faith belief that their bogus document was an Environmental Contractors license. Given this record, for the court to have told the jury that defendants were "entitled to describe" Environmental Contractors "as licensed" would have been error.

b. *The Evidentiary Challenges*

McDonald, who did not testify at trial, presented only character evidence in his defense. In addition to producing witnesses to testify to his honesty and integrity, he sought to introduce evidence that his then-teenage son had been born with cerebral palsy and that McDonald had devoted his life to caring for the son, in order to persuade the jury that McDonald would never do anything to risk imprisonment thereby disabling himself from caring for the boy. He contends that the court erroneously excluded this evidence. We find no basis for reversal.

The admissibility of character evidence rests in the sound discretion of the trial judge, and we will not disturb the trial court's ruling absent an abuse of discretion. *See, e.g.*, *United States v. Davis*, 546 F.2d 583, 592 (5th Cir.) ("Rarely and only upon a clear showing of prejudicial abuse of discretion will appellate courts disturb the rulings of trial courts in the admissibility of character evidence."), *cert. denied*, 431 U.S. 906 (1977). It is within the court's discretion to exclude evidence that is prejudicial, as well as "evidence of specific acts intended to demonstrate character traits not at issue." *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984), *cert. denied*, 479 U.S. 839 (1986).

Here, the court properly allowed McDonald's four character witnesses to testify to their opinions that McDonald was a forthright man of honesty whose integrity was beyond reproach. It was well within the court's discretion to draw the line to exclude testimony that had no bearing on his honesty or integrity and that could well cause the jury to be influenced by sympathies having no bearing on the merits of the case.

McDonald's other evidentiary contention is that the court improperly allowed the government to pose questions that assumed his guilt. In *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991), decided after the trial of the present case, we held that lay character witnesses should not be asked "guilt-assuming hypothetical questions." Here, one of the government's challenged questions was:

> Are you aware, Ms. Tanella, that on the permit application in the area, in the part of the permit applica-

> tion regarding the New Hanover Incinerator, John McDonald forged the name of another individual and wrote the name of another individual on that application?

(Trial Transcript, April 24, 1990, at 3761.) The government concedes that this question, though not in the form of a hypothetical, was improper under the spirit of this Court's ruling in *Oshatz*. We agree that the question was improper, but we regard this single improper question in the course of the 12-week trial as harmless error.

III. CHALLENGES TO SENTENCING

Paccione and Vulpis also challenge their sentences. In calculating the offense level of each of these defendants under the applicable version of the Guidelines (referred to as "1988 Guidelines" to the extent that they differ from the 1990 version), the court arrived at a total offense level of 32. The imprisonment range for this level, in light of Paccione's and Vulpis's respective criminal history categories, was 121-151 months. Noting in its sentencing opinion, 751 F. Supp. 368 (1990), that Paccione and Vulpis had "been convicted of one of the largest and most serious frauds involving environmental crimes ever prosecuted in the United States," *id.* at 371, the court sentenced Paccione and Vulpis to 151 months' imprisonment. Paccione and Vulpis challenge various aspects of the court's calculations, including its use of the Guidelines section dealing with environmental offenses rather than that dealing with mail fraud to reach an initial offense level of 26 rather than 23, its use of the Guidelines' multiple-count rules to increase the offense level from 26 to 28, and its two-level departure increasing the offense level from 30 to 32 on the basis of its finding that Paccione and Vulpis had defrauded the government and the court in entering into the forfeiture agreement.

A. *Use of the Environmental Offense and Multiple-Count Sections*

Under 1988 Guidelines § 2F1.1, which covered the RICO offenses and mail fraud offenses, the district court calculated that Paccione and Vulpis would, considering enhancements for offense characteristics and adjustments for their leadership roles, have an initial offense level of 23. The court observed, however, that the Guidelines recognize that RICO and mail fraud statutes are often used as jurisdictional bases for the prosecution of other offenses, and that Application Note 15 to 1988 Guidelines § 2F1.1 provided that "[i]n such cases the most analogous guideline . . . is to be applied." Finding that defendants' illegal dumping of waste had "caused serious environmental harm," 751 F. Supp. at 376, the court concluded that the most analogous Guidelines provision was § 2Q1.2, which deals with offenses involving the mishandling of hazardous or toxic substances. Calculating offense levels under this section, with enhancements for offense characteristics and adjustments for leadership roles, the court concluded that the proper initial offense level was 26. These calculations followed the recommendations of the Presentence Reports ("PSRs") prepared by the Probation Department. They were not objected to by Paccione or Vulpis in the district court.

The court also noted that if Paccione and Vulpis were to be sentenced under § 2F1.1, the mail fraud section, instead of under § 2Q1.2, their initial offense level would still have been 26, not 23, because the court would have departed upwardly under Guidelines § 5K2.0 or § 5K2.5 to take into account the serious environmental harm and its "very strong nexus" with the fraud. 751 F. Supp. at 375 n.4. The court stated as follows:

> This court could have chosen not to look at the environmental offenses at all but rather to sentence the defendants pursuant only to the fraud offense. If that had been the case, this court would have had to substantially depart upward to capture the harm which defendants caused to both the CSX land and the environment. In deciding how many levels to depart upward, this court would have looked to the environmental offense guidelines as a template. Thus the defendants would have had the same offense level whether this court . . . looks at the environmental offenses or whether this court used its discretionary powers under § 5K2.0 or § 5K2.5.

751 F. Supp. at 375 n.4.

Having calculated defendants' initial offense level as 26, the court next looked to the Guidelines' multiple-count rules and determined that the environmental offenses were separate from the mail fraud offenses, and thus could not be grouped together as a single offense under § 3D1.2 but rather required a further adjustment under § 3D1.4. The court concluded that application of the latter section resulted in a two-level adjustment, giving these defendants an interim offense level of 28. This calculation too followed the recommendations of defendants' respective PSRs and was not objected to by Paccione or Vulpis in the district court.

The court also noted, however, that if it had not concluded that the Guidelines required this upward adjustment under the multiple-count rules, it would have departed upwardly by two levels, still resulting in an interim offense level of 28:

> Alternatively, if this court were only able to look at the environmental offense, this court would have had to depart upward under § 5K2.0 to take into account the fact that the defendants had defrauded various agencies and individuals. Under these circumstances, this court would have departed at least two levels. Thus the resulting level would have been the same even if the court did not use the multiple count adjustment.

751 F. Supp. at 378 n.7.

Paccione and Vulpis contend here that the sentencing court erred (a) in calculating their offense levels using the environmental offense section of the Guidelines, rather than the section dealing with mail fraud, resulting in an initial offense level of 26, rather than 23, and (b) in using the multiple-count sections to increase their interim offense levels to 28. Though the latter contention has some merit and the former gives us pause, we conclude that, given the court's alternative rulings, these matters do not require recalculation of the sentences.

Preliminarily, we note that, as indicated above, these two adjustment objections were not voiced in the district court. Given the complexity and novelty of this type of case, however, we find it appropriate to consider these issues on appeal. *See, e.g., United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990); *see also United States v. Rodriguez*, 943 F.2d 215, 216-17 (2d Cir. 1991). Accordingly, we address the propriety of the court's use of the environmental sections found in Chapter Two of the Guidelines and the multiple-count sections found in Chapter Three.

The challenge to the district court's use of the environmental offense sections presents interesting questions.

The Guidelines provide that, for calculation of a defendant's offense level, the applicable guideline section is generally to be determined with reference to the offense of conviction. Thus, § 1B1.2(a) instructs the court, where there has been no plea of guilty or nolo contendere establishing a more serious offense than the offense of conviction, to "[d]etermine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."

In the present case, the indictment charged defendants with mail fraud, wire fraud, and RICO offenses; they were convicted of mail fraud and RICO offenses. Thus, under § 1B1.2(a), defendants' offense level would have been calculated under the Guidelines section dealing with mail fraud, *i.e.*, 1988 Guidelines § 2F1.1, yielding an offense level of 23. *See* Guidelines § 2E1.1 (for RICO, base offense level is 19 or offense level applicable to the underlying racketeering activity, whichever is higher). A problem arises because an application note to the mail fraud section stated that

> [i]n certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state law arson where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. *In such cases the most analogous guideline (in the above case, §2K1.4) is to be applied.*

1988 Guidelines § 2F1.1 Application Note 15 (emphasis added). On the face of it, this Note appears to direct the district court to proceed precisely as it did in the present case, *i.e.*, not to use the fraud section but to use the section dealing with environmental offenses. The difficulty, since defendants were not charged with or convicted of environmental offenses, is that 1988 Guidelines § 2F1.1 Application Note 15 appears to conflict with § 1B1.2(a)'s requirement that calculation of offense level proceed under sections dealing with the "offense of conviction (*i.e.*, the offense conduct charged in the count of the indictment or information of which the defendant was convicted)."

Our view that the two provisions were in conflict here is supported by the current version of the corresponding application note (now numbered 13) to § 2F1.1. This version, which became effective on November 1, 1989, authorizes the court, upon a mail fraud conviction, to apply a section other than § 2F1.1 only if the other section deals with an offense that was "establish[ed]" in the information or indictment. Thus, the amended version deleted the language of the 1988 version's Note 15 emphasized above and substituted the following:

> Where the indictment or information setting forth the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline, apply that guideline rather than § 2F1.1. Otherwise, in such cases, § 2F1.1 is to be applied, but a departure from the guidelines may be considered.

Guidelines § 2F1.1 Application Note 13. The explanation of the Sentencing Commission reveals that the major "purpose[ ] of this amendment [was] to ensure that this guideline is interpreted in a manner consistent with § 1B1.2." Guidelines App. C, Amendment 155.

This amended version of § 2F1.1 was in effect at the time defendants in the present case were sentenced, and were we to apply the amended version, we would likely conclude that the district court should not have calculated their offense levels under the environmental offense sections. Normally, of course, the court is to apply the version of the Guidelines that is in effect at the time of sentencing, *see* 18 U.S.C. § 3553, unless there is an ex post facto problem. *United States v. Adeniyi*, 912 F.2d 615, 618 (2d Cir. 1990); *cf. Miller v. Florida*, 482 U.S. 423, 435-36 (1987) (application of state's revised sentencing guidelines, in effect at time of defendant's sentencing, violates ex post facto clause if it " 'makes more onerous the punishment for crimes committed before its enactment' ") (quoting *Weaver v. Graham*, 450 U.S. 24, 36 (1981)). The application of the amended § 2F1.1 here would have created an ex post facto problem because the amended § 2F1.1 also modified the offense level enhancements for specific offense characteristics; thus, the initial offense level for Paccione and Vulpis under the amended version, after enhancements and leadership adjustments, would be 28, as contrasted with a level of 23 under the 1988 version. As a result, though application of the version of § 2F1.1 in effect at the time of sentencing would appear to prevent calculation of defendants' offense levels under the sections governing environmental offenses, it would also result in a higher offense level. Hence, the version of the Guidelines in effect at the time of sentencing could not be applied, and application of the 1988 version of the Guidelines was required.

Accordingly, we are left with the question of whether the direction given in Application Note 15 to 1988 Guidelines § 2F1.1 overrode the instructions given in § 1B1.2. From the 1989 amendment and the Commission's explanation for the amendment, it is clear that the Commission recognized the possibility of erosion of § 1B1.2, but that none was intended. Fortunately, however, we need not resolve the conflict between apparent effect and later-clarified intent, for the district court stated an alternative basis for its arrival at an offense level of 26.

The court stated that if it had sentenced Paccione and Vulpis under § 2F1.1 it would have, under Guidelines § 5K2.0 or § 5K2.5, "substantially depart[ed] upward to capture the harm which defendants caused to both the CSX land and the environment." 751 F. Supp. at 375 n.4. Section 5K2.0 provides that the "sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating . . . circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.' " Guidelines § 5K2.0 (quoting 18 U.S.C. § 3553(b)); *see generally United States v. Kim*, 896 F.2d 678, 681-83 (2d Cir. 1990). Since there is no indication that when it formulated punishments for mail fraud, the Commission took into account the possible causation of massive environmental damage such as that proven here, a § 5K2.0 departure would not have been an abuse of discretion. We therefore see no basis for disturbing the court's arrival at an initial offense level of 26.

There is also a difficulty, together with a similar curative alternative holding, in connection with the court's use of the Guidelines' multiple-count provisions to increase defendants' offense level from 26 to 28. The court referred to § 3D1.2 to determine whether "the fraud offense and the environmental offense can[ ] be grouped together," 751 F. Supp. at 377; determining that they could not be grouped, it concluded that § 3D1.4 therefore required a two-level upward adjustment. The multiple-count sections, however, provide rules for calculating, either by grouping or by adjustment, a single offense level that takes into account all of "the counts of which the defendant is convicted." Guidelines Chapter Three, Part D—Multiple Counts, Introductory Commentary. The underlying premise of either grouping or adjustment under these rules is that there have been multiple counts and multiple convictions. *See generally United States v. Blanco*, 888 F.2d 907, 909-11 (1st Cir. 1989) ("Guidelines provide[ ] that, for the most part, the court will determine the *applicable guideline* by looking to the charge of which the offender was convicted" (emphasis in original); other conduct not charged as an offense may be taken into account under relevant conduct rules or in departure from the Guidelines, not under multiple-count rules). Here, no counts of the indictment charged Paccione and Vulpis with violation of federal environmental laws, and they were not convicted of environmental offenses. Accordingly, the only offenses subject to the multiple-count rules were the RICO and mail fraud offenses.

Again, however, there is no basis for resentencing, for the court stated that if no upward multiple-count adjustment were proper, the court would, under § 5K2.0, depart upwardly by two levels. For the reasons indicated above, such a departure would not have been an abuse of discretion.

B. *Departure for Failure To Perform Forfeiture Agreement*

The district court's final upward departure, from level 30 to level 32, was based on the defaults of Paccione and Vulpis on their obligations under the forfeiture agreement.

The agreement, dated June 6, 1990, and so-ordered by the court on June 8, made Paccione and Vulpis and their respective companies jointly and severally liable to pay the government, if they were convicted under RICO, a total of $22 million in lieu of forfeitures, restitution, and fines. The agreement called for defendants to make a $4 million payment within 30 days after the agreement was signed, another $8 million within 60 days after signing, and the remaining $10 million within 90 days after signing. Thus, the entire $22 million should have been paid to the government by early September 1990. Defendants made no payments whatever.

The government entered default judgments against these defendants following their initial failure to perform; and, in part relying on the total default, it urged the district court not to follow PSR recommendations that Paccione and Vulpis be given sentencing credit for acceptance of responsibility. At a September 11, 1990 hearing with respect to the PSR recommendations, the court asked the government to advise it of the status of the forfeiture agreement as far as Paccione and Vulpis were concerned.

The government attorney stated that there had been no payments, interim or final. He stated that a few contracts for sales of assets of the Paccione and Vulpis companies had been submitted to the government, but that they would result in negligible front-end cash payments and in extended payment schedules. The government was pursuing its default judgments and had sought to take depositions to identify assets with which to satisfy the judgments. It had scheduled depositions of Paccione and Vulpis but canceled them when it was advised that both men would invoke the Fifth Amendment. It had also noticed the deposition of a proposed purchaser of certain

Paccione company routes; but it was not certain whether that deposition would proceed either, since there had been a suggestion that the purchaser, a relative of Paccione by marriage, would decline to answer any question dealing with the bona fides of his purchase contract. Following the government's representations, which were not disputed, the court ordered a hearing to permit it to determine whether, in entering the forfeiture agreement, Paccione and Vulpis had intentionally defrauded the government.

At the September 12, 1990 hearing, the court heard testimony from witnesses called by Paccione and Vulpis, discussed in greater detail below, and heard argument from both sides. Additional information was presented at an October 3, 1990 hearing. Thereafter, addressing Paccione's attorney, the court stated,

> [i]t is my finding that this constitutes the biggest fraud that I have any personal knowledge of on the United States Government that I have seen since I have been on the bench. And that's what we got here. A perfect fraud by you[r] client, Mr. Paccione and whoever assisted him in this misrepresentation that he would have the ability to produce $22 million by September the 8th.

(Sentencing Transcript, October 3, 1990, at 57.) In its sentencing opinion, the court found "that both defendants intentionally entered into the $22 million agreement without bona fide purchasers in sight knowing that the businesses could not be sold within the ninety day period because of procedural requirements," 751 F. Supp. at 381, and stated as follows:

> [P]rior to the jury's verdict, defendants entered into a Settlement Agreement with the Government that

provided that if defendants were found guilty, they would pay the Government $22 million in lieu of forfeiture and fines. . . . Under the terms of the agreement, defendants were jointly and severally liable. In exchange defendants received a complete resolution to any financial penalties rather than allowing the jury to determine any possible forfeiture and the court any possible fines. Under the agreement, the entire $22 million was due, in full, by September 8, 1990, after two prior installment payments. Sentencing was scheduled for September 12, 1990. The agreement contemplated that the money would be raised by the selling off of the numerous waste carting businesses which Paccione and Vulpis owned and which corporations were also defendants in this case. This court approved the agreement as requested by the parties.

As of this date, however, defendants have not paid one penny to the Government. Defendants claim that they were unable to make the required payments because of difficulty in selling their businesses. This court concludes that defendants had difficulty selling their business, but it is also the view of this court that defendants knew full well when they entered into the agreement that they would be unable to sell their businesses within the short amount of time for which the agreement provided without prior offers to buy from bona fide purchasers. The private waste carting business is a closed market and potential buyers consist largely of friends and relatives of defendants. . . . The court finds and concludes that friends and relatives cooperated with defendants in not purchasing the lucrative businesses owned by defendants and allowing defendants to remain in possession.

> Defendants had to have been aware of the fact that there would not be any buyers when they entered into the agreement. Defendants' actions caused the question of forfeiture to be taken away from the jury and has caused this court's hands to be tied with respect to the fines.
>
> In addition, there was also testimony that, even if defendants had entered into a contract with a buyer, it could take as much as two years to obtain a license from New York City's Department of Consumer Affairs. . . . Paccione and Vulpis, who were both involved in the carting business for many years before their trial, were aware of the procedures involved in selling a business and had to know that a sale of a business in such a short time, even with a ready, able and willing, buyer, was close to impossible.
>
> . . . .
>
> This court finds that defendants' actions constitute a fraud upon both the Government and this court because the agreement caused the issue of forfeiture to be withdrawn from the jury and prevents the court from imposing fines.

Id. at 379-80.

Finding that these were unusual circumstances not adequately considered by the Sentencing Commission, the court concluded that it had discretion to depart upwardly under § 5K2.0. It chose to add two levels because defendants' conduct was closely analogous to obstruction of justice, for which the Guidelines provide a two-level upward adjustment. *See* Guidelines § 3C1.1 ("If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels."). The court stated that as an alternative to departure, it would have adjusted the offense level upward by two levels pursuant to § 3C1.1.

Paccione and Vulpis argue here that any increase in the severity of their sentences on the basis of fraud in entering the forfeiture agreement was impermissible because (a) the court erroneously placed on them the burden of proving their intent to perform, (b) the evidence did not support the court's finding that they entered into the agreement without intent to perform, and (c) it was unfair to penalize them for failing to perform while allowing the government to enforce the agreement. We reject all of their contentions.

First, we see no merit in defendants' suggestion that the district court misallocated the burden of proof. At the end of the September 11 hearing, following the government's representations as to nonperformance, the court stated as follows:

> THE COURT: . . . . I consider at the moment that there has been a major fraud committed here on the part—with the government as the victim . . . . The present fraud makes pale and insignificant the fraud prosecuted in the trial, so you've got a chance to prove otherwise, and you better start tomorrow morning.
>
> . . . .
>
> THE COURT: . . . I have said we are going to have a hearing on this because I believe the government has been defrauded and that the court has been mis-

> led. Now you are going to have your chance to prove otherwise.

(Sentencing Transcript, September 11, 1990, at 97.) We do not see in this statement or in any other an indication that the court placed the burden of proof, as contrasted with the burden of going forward, on Paccione and Vulpis. Rather, the court merely indicated that the government—having represented without contradiction that, *inter alia*, in the agreed 90-day period Paccione and Vulpis had not paid the government a cent, that the few contracts for sales of assets that defendants had negotiated were for small fractions of the sum due, that these would result in payouts measured not in days but in years, and that defendants and one of their prospective purchasers were invoking Fifth Amendment privilege with respect to the bona fides of these sales—had established a prima facie case. Thus, at the hearing, the court stated, "I also suggested that, prima facie, that looks like a major fraud . . . ." (Sentencing Transcript, September 12, 1990, at 126.) The government having shown facts from which intent not to pay could be inferred, the court merely informed Paccione and Vulpis that it was their burden to come forward with evidence to rebut the government's prima facie case. The court's eventual findings also reflect no misallocation of the ultimate burden of proof. The court did not at all suggest that defendants had merely failed to prove their intent to perform. Rather, it found affirmatively "that defendants knew full well when they entered into the agreement" that they would not perform.

Nor are we persuaded that the evidence was insufficient to support the court's finding that Paccione and Vulpis had entered into the forfeiture agreement without the intent to perform their obligations under it. Such a finding need be supported only by a preponderance of the evidence, *see, e.g., United States v. Shoulberg*, 895 F.2d 882, 886-87 (2d Cir. 1990); *United States v. Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1833 (1990), and it may not be overturned unless clearly erroneous, 18 U.S.C. § 3742(e) (1988); *see United States v. Santiago*, 906 F.2d 867, 871 (2d Cir. 1990); *United States v. Parker*, 903 F.2d 91, 103 (2d Cir.), *cert. denied*, 111 S. Ct. 196 (1990); *United States v. Shoulberg*, 895 F.2d at 884. The evidence, taken in the light most favorable to the government, included the following.

Paccione and Vulpis did not testify but introduced the testimony of their accountants, of attorneys who had attempted to negotiate sales of some of their companies' assets, and of court-appointed monitors who had been supervising the operations of the corporate defendants for more than a year prior to the signing of the forfeiture agreement. Principally through their attorneys, Paccione and Vulpis argued that they had expected in good faith to be able to sell enough assets to pay the government $22 million in 90 days. But the evidence was that when they entered into the forfeiture agreement, they had no purchasers waiting in the wings. Further, they indicated that they had expected to find purchasers easily and that they were surprised to find that potential purchasers were slow to agree to pay full value because once Paccione and Vulpis were convicted potential buyers believed they could get bargains because Paccione and Vulpis were required to sell to perform the forfeiture agreement. In light of defendants' extensive business experience and the facts that the agreement envisioned assets sales and that it provided for forfeiture only if defendants were convicted, the court was hardly required to credit these professions of surprise. In addition, the witnesses indicated that, as these experienced defendants would know, once a sale contract is executed, it normally takes longer than 90 days (three months to two years, according to Paccione's attorney) to obtain the necessary local regulatory approvals.

Defendants' witnesses also indicated that contracts for sales of carting routes normally call for very small cash down payments and very long payouts. Further, even the small monthly payments called for by the contracts they negotiated were subject to reduction if income from the sold routes decreased. Thus, the contracts that were negotiated, far from meeting defendants' obligations to pay $22 million in 90 days, provided them with no funds to pay the government anything within 90 days, provided them with little more than $1 million to pay the government upon regulatory approval of the sales, and would have dribbled the rest of the $22 million to the government over a period of many years. Along the same lines, Vulpis's father in August 1990 offered a modification of the forfeiture agreement insofar as Vulpis's presumed share was concerned: he offered to pay the government $100,000 (increased to $500,000 two days before the hearing), to be followed by payments of $100,000 per month for 12 years.

It is also noteworthy that though Paccione and Vulpis claimed to have believed in good faith that they would be able to pay the government the entire agreed amount within 90 days of signing the forfeiture agreement, they made little effort to show that they had had any good faith belief that they could pay the government the $4 million they agreed to pay within the first 30 days or the additional $8 million they agreed to pay within the second 30 days. Vulpis sought to show that he had attempted to obtain a $2 million mortgage during the first month after the forfeiture agreement; he apparently was surprised that the bank would not lend him $2 million when it learned he was about to go to jail.

The court was also entitled to believe that the testimony presented by Paccione and Vulpis as to the timing of their efforts to sell assets tended to detract from, rather than support, their protestations of good faith. Paccione, for example, had entered into four contracts that were supposed to generate money to pay half of the $22 million; of these four (which cumulatively called for front-end cash payments of only some $1.2 million), only one, for $1.5 million, was executed prior to the expiration of the 90-day period. None of the contracts had been approved by the local regulatory agency. Vulpis's attorney had negotiated toward two sales of assets; one sale apparently fell through in July. A proposed contract for the other was not sent to the purchaser until August 28; by the September 12 hearing, Vulpis's attorney had heard nothing from the purchaser and had not followed up.

In sum, viewed in the light most favorable to the government, the evidence showed that Paccione and Vulpis had not paid the government a penny of the sums due; that their efforts to sell assets were few and late; and that they had promised to make payments totaling $22 million within 90 days knowing that if convicted they would be under pressure to sell assets, knowing they had no purchasers lined up, knowing that most contracts are for small amounts of cash and extended payouts, and knowing that most sales require considerably longer than 90 days just to receive local regulatory approval. On the present record, we cannot say the district court's finding that Paccione and Vulpis entered into the forfeiture agreement without the intent to perform it was clearly erroneous.

Finally, we see no merit in defendants' argument that, because the government retained the right to enforce the forfeiture agreement, it was unfair for the court to consider their fraud as a ground for increasing their prison terms. In support of this argument, Paccione and Vulpis urge us to treat this matter strictly as a contract dispute. Though contract principles obviously are material, *see Santobello v. New York*, 404 U.S. 257 (1971), we reject defendants' argument both because the sentencing context cannot be ignored and because in fact defendants received the principal benefit of their bargain and the government did not.

To begin with, we note that the forfeiture agreement did not purport to affect the prison terms to which Paccione and Vulpis could be sentenced. Rather, the agreed forfeiture was to be "in full satisfaction of the forfeiture penalties [for RICO conviction], as contained in paragraphs 64 through 68 of [the indictment], as well as whatever fines and restitution might otherwise be imposed pursuant to Title 18, United States Code." The cited paragraphs of the indictment sought to compel the individual defendants, *inter alia*, to forfeit their interests in the corporate defendants, as well as all proceeds of defendants' racketeering activity. *See, e.g.*, 18 U.S.C. § 1963(a)(2)(A) (forfeitability of interest in RICO enterprise); *id.* § 1963(a)(3) (forfeitability of property constituting or derived from proceeds of racketeering activity). Had the forfeiture issue been submitted to the jury, the jury could have stripped Paccione and Vulpis of their interests in their respective companies (having a conceded value of at least $27-$53 million); or it could have determined that the proceeds of the defendants' racketeering activity included $20 million for the taking of CSX's property, plus all dumping fees charged by A&A, all dumping fees saved by the corporate defendants, and all derivative proceeds from the activity, perhaps totaling more than $10 million. Hence, jury-determined forfeitures could easily have totaled $30 million or more. Moreover, in the absence of the forfeiture agreement, the court could have ordered defendants to make restitution to CSX and the City, the victims of their racketeering activity, in addition to any RICO forfeitures. *See* 18 U.S.C. §§ 3663(a)(1), (a)(2), and (b)(1)(B) (court may order defendant to make restitution to RICO victim of the value of the property lost); *United States v. Robilotto*, 828 F.2d 940, 944, 949 (2d Cir. 1987) (no Eighth Amendment violation in sentence requiring defendant both to forfeit moneys to United States and to make restitution to victim), *cert. denied*, 484 U.S. 1011 (1988); *United States v. Feldman*, 853 F.2d 648, 660, 663 (9th Cir. 1988) (same), *cert. denied*, 489 U.S. 1030 (1989). Thus, the monetary risks to Paccione and Vulpis upon conviction of RICO offenses totaled some $30-$80 million. By entering into the forfeiture agreement, however, they limited their risk of financial penalties to $22 million.

Defendants have retained this bargained-for limitation despite their defaults. The district court found itself barred from imposing fines on them or ordering restitution. By the time defendants defaulted, forfeiture questions could no longer be submitted to the jury. And defendants' assets worth upwards of $53 million, though subject to a sheriff's auction to permit collection of the $22 million, are not themselves forfeited by reason of the defaults. *See United States v. Paccione*, Nos. 91-1325L, etc. (2d Cir. Nov. 4, 1991).

The government, on the other hand, though it has the right to enforce default judgments against Paccione and Vulpis, has hardly received the principal benefit of its bargain. It was to receive $22 million in cash within 90 days, thereby receiving the monetary penalties for the RICO convictions without further effort on its part. Instead the government received nothing and is required to engage in perhaps protracted court proceedings, pursue defendants' assets, and attempt to sell those assets in order to collect its judgments. *See United States v. Paccione*, Nos. 91-1325L, etc. (2d Cir. Nov. 4, 1991) (government required to follow state creditor procedures to collect its $22 million).

Given the district court's adequately supported finding that defendants had entered into the forfeiture agreement without intending to perform it, we see nothing in the Guidelines or in logic to suggest that the conduct of Paccione and Vulpis should not have been considered attempts to "impede[ ] the administration of justice during the . . . sentencing of the instant offense" within the meaning of Guidelines § 3C1.1, warranting a two-level upward adjustment in offense level. If the present type of fraud was not envisioned by that section, an upward departure under § 5K2.0 was hardly an abuse of discretion.

CONCLUSION

We have considered all of defendants' arguments on these appeals and have found in them no basis for reversal. The appeal of Environmental Contractors is dismissed. The judgments of conviction of the other defendants are affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, - v - ANGELO PACCIONE, ANTHONY VULPIS, JOHN McDONALD, A&A LAND DEVELOPMENT, W&W PROPERTIES, AUGUST RECYCLING, INC., NATIONAL CARTING, INC., STAGE CARTING, INC., NEW YORK ENVIRONMENTAL CONTRACTORS, INC., ROSEDALE CARTING, INC., AND VULPIS BROTHERS, LTD., Defendants.	SSS 89 CR. 446 (CBM) OPINION ON DEFENDANTS' MOTIONS TO DISMISS

BACKGROUND

Indictment 89 CR. 446 was filed on June 15, 1989. A superseding indictment adding Defendant McDonald was filed on August 24, 1989. The superseding indictment charges defendants with the following: substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18

U.S.C. Sections 1962(c) and (d), through a "pattern of racketeering activity" and mail and wire fraud violations of 18 U.S.C. Section 1341. The RICO counts of that superseding indictment alleged twenty-two racketeering acts, including mail fraud on New York City and State government agencies, mail and wire fraud on CSX Transportation Inc. ("CSX") and mail fraud on doctors and medical care facilities. A superseding indictment removing, inter alia, Racketeering Acts 19-22, alleging acts of mail fraud on several doctors and a nursing home, was filed on February 6, 1990. A further superseding indictment, removing Racketeering Act 1(d) and the corresponding Count 6 -- an alleged act of mail fraud against the City of New York -- and adding two mailings to Racketeering Act 4, Acts 4(a) and (b) corresponding to new Counts 8 and 9 -- alleging acts of mail fraud against CSX Realty, was filed on March 8, 1990.*

Defendants have moved pursuant to Fed. R. Crim. P. 12 and 41 for the following:

1) dismissal of Counts One and Two of the indictment (the RICO counts) on the grounds that they are unconstitutionally vague; 2) dismissal of the RICO counts or striking of Racketeering Acts 1-2 and 5-22 on the grounds that environmental crimes are not authorized RICO predicate acts; 3) dismissal of Counts 3-8 of the indictment, alleging mail fraud against the City of New York on the grounds

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* Since the changes made in the two superseding indictments following the court's January 27, 1990 Order denying the motions discussed in this Opinion do not affect Defendants' arguments, this Opinion will refer to the Racketeering Acts and Counts of the first superseding indictment ("the indictment").

that they are based on insufficient evidence; 4) dismissal of Racketeering Acts 1-2 and 5-22 and Counts 3-8 of the indictment on the grounds that the conduct alleged does not constitute mail fraud; 5) dismissal of the RICO counts on the grounds that there is no separation alleged between the enterprise and the persons conducting the affairs of the enterprise; 6) dismissal of the RICO counts on the grounds that the indictment does not allege a proper enterprise; 7) severance of the trial of Angelo Paccione and Anthony Vulpis from John McDonald on the grounds that severance is required under Bruton v. United States, 391 U.S. 123 (1968) and that their defenses will be antagonistic and mutually exclusive; 8) suppression of the evidence seized pursuant to the search warrants on the grounds that the warrants authorized a general search in violation of the Fourth Amendment's particularity clause; 9) suppression of evidence seized pursuant to allegedly warrantless searches.

Defendant John McDonald has also moved pursuant to Fed. R. Crim. P. 12(b)(3) for suppression of statements allegedly made by Defendant McDonald on or about July 19, 1989.

For the following reasons, these motions are denied.

ANALYSIS

1. The RICO Statute Is Not Unconstitutionally Vague

Defendants have moved to dismiss Counts One and Two of the indictment (the RICO substantive and conspiracy counts) on the ground that the RICO statute is unconstitutionally vague. Defendants assert that the terms "pattern of racketeering activity," "enterprise" and "association" with the enterprise are so vague as to provide little or no notice to any person of what conduct is prohibited and that the statute has provided neither content nor standard for determining what these terms mean, nor have the courts provided any meaningful limitation.

Relying extensively on dicta in Justice Scalia's concurring opinion in H.J., Inc. v. Northwestern Bell Telephone Co., 109 S.Ct. 2893 (1989), 1989 U.S. LEXIS 3239, defendants maintain that the terms "pattern of racketeering" activity, "enterprise," and "association" with the enterprise, are concepts so vague as to violate the notice to defendants requirement that the due process clause of the Fifth Amendment imposes on all federal criminal statutes. Defendants also complain that the vagueness of the statute's language, especially as to the meaning of "association" with the enterprise, is such as to give to the prosecutors impermissible discretion as applied to this case.

In H.J., Inc., the Court defined the term "pattern of racketeering" which requires proof by the prosecution of at least two predicate acts, as enumerated in the RICO statute, as consisting of two components: (1) relatedness and (2) continuity.

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. For analytic purposes these two constituents of RICO's pattern requirement must be stated separately, though in practice their proof will often overlap. The element of relatedness is the easier to define, for we may take guidance from a provision elsewhere in the Organized

Crime Control Act of 1970 (OOCA), Pub. L. 91-452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 U.S.C. Section 3575 et seq. (now partially repealed). Title X provided for enhanced sentences where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct. As we noted in Sedima, 473 U.S., at 496, n.14, Congress defined Title X's pattern requirement solely in terms of the relationship of the defendant's criminal acts one to another: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. Section 3575(e) ... RICO's legislative history tells us, however, that the relatedness of racketeering activities is not alone enough to satisfy Section 1962's pattern element. To establish a RICO pattern is must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity ... "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal consent -- and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear to one another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the threat of continuity is demonstrated. See S. Rep. No. 91-617, at 158.

Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities -- preferring to deal with this issue in the context of concrete factual situations presented for decision -- we offer some examples of how this element might be satisfied. A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit. Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an

> ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

Id., at 8-10.

The Court construed the term "pattern" as requiring plaintiffs or prosecutors to prove "... continuity of racketeering activity, or its threat, simpliciter. This may be done in a variety of ways, thus making it difficult to formulate in the abstract any general test for continuity." Id., 1989 U.S. LEXIS 3239, at 9.

The term "pattern of racketeering" had been previously defined by the Second Circuit as requiring similar proof. Very recently in United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989), this Circuit, en banc, defined the meaning of the term "pattern of racketeering," which definition is binding on this Court:

> [P]roof of two acts of racketeering activity without more does not suffice to establish a RICO pattern; ... the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise, and ... a RICO pattern may not be established without some showing that the racketeering acts are interrelated and that there is a continuity or a threat of continuity; ... a pattern may be established without proof of multiple schemes, multiple episodes, or multiple transactions; and ... racketeering acts that are not widely separated in time or space may nonetheless, given other evidence of the threat of continuity, constitute a RICO

> pattern.

Id. at 1381. (emphasis added)

> The degree to which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions. Congress' elaboration on the concept of pattern in connection with its provision in 18 U.S.C. Section 3575(e) for dangerous special offenders is instructive. As discussed in Sedima's footnote 14, [Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984), rev'd, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985)] that section provided that criminal conduct would form a pattern if it embraced criminal acts that had for example, "the same or similar purposes, results, participants, victims, or methods or commission." 18 U.S.C. Section 3575(e) (1982), repealed by Sentencing Reform Act of 1984, Pub. L. No. 473, tit. II, Sections 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031.

Indelicato, at 1382.

The allegations in the indictment in this case satisfy the Indelicato requirements. The Government alleges in the indictment that the racketeering acts are interrelated and that there is a threat of continuity, if not continuity in fact. "The validity of the indictment is to be tested by its allegations, not by defense counsel's forecast of the ... evidence," so that a technically sufficient indictment "is not subject to dismissal on the basis of factual questions, the resolution of which must await trial." United States v. Black, 291 F.Supp. 262, 264 (S.D.N.Y. 1968) (Weinfeld, J,).

Lower federal courts have found the specific provisions challenged by defendants here as well as other related provisions not to be vague. United States v. Tripp, 782 F.2d 38, at 41-42 (6th Cir. 1986) (rejecting contention that definition of "racketeering activity" is void for vagueness); United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir. 1984); United States v. Scotto, 641 F.2d 47, 52 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Huber, 603 F.2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979) (Section 1962(c) not vague and, in particular, terms "enterprise," "employed by or associated with," "directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity," and "pattern of racketeering activity," not vague; United States v. Castellano, 416 F.Supp. 125, 128 (E.D.N.Y. 1975); United States v. Scalzitti, 408 F.Supp. 1014 (W.D. Pa. 1975), appeal dismissed without opinion, 556 F.2d 569 (2d Cir.

1977) ("conduct of affairs" language of Section 1962(c) not vague); United States v. Stofsky, 409 F.Supp. 609, 612-14 (S.D.N.Y. 1973) ("conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity" not vague) aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 422 U.S. 819.

Although the aforementioned cases were decided prior to H.J. Inc., RICO's statutory requirement of an "enterprise," "association with the enterprise" and "a pattern of racketeering activity" have not changed since these cases were decided; thus, these cases still have precedential value.

Justice Scalia concurring in the result in H.J., Inc. assessed the definitional problems pertaining to the "pattern" requirement in the RICO statute and rejected the majority's definition as inadequate. He opined that the definitional difficulties, as the Court's opinion demonstrates, may make the RICO statute vulnerable to future constitutional attack.

The Second Circuit has also previously construed "enterprise," and "association" with an enterprise.

In discussing the relationship between "pattern" and "enterprise" in United States v. Turkette, 452 U.S. 576, 101 S.Ct. 2524, 69 L. Ed. 2d 246 (1981), the Court had stated as follows:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. [Section 1961(1).] The former is proved by evidence of an

> ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.... While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id., cited in United States v. Indelicato, 865 F.2d 1370, 1376 (2d Cir. 1989).

The statute defines enterprise clearly.

18 U.S.C., Section 1961(4) reads as follows:

> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

As discussed, infra, at pages 28-

30, the indictment properly alleges the existence of an enterprise. It specifically identifies "the enterprise" to include: the individual defendants, Angelo Paccione, Anthony Vulpis, John McDonald, and Fred E. Weiss; the defendant partnerships, A&A Land Development and W&W Properties; and the defendant corporations, August Recycling, Inc., National Carting, Inc., Stage Carting, Inc., New York Environmental Contractors, Inc., Rosedale Carting, Inc., and Vulpis Brothers, Ltd.

Although defendants would have this court believe that the theoretical permutations and boundaries of the words "associated with an enterprise" are indiscernible, the Government has alleged that such relationships exist in this case as a matter of fact.

Title 18 U.S.C. Section 1962(c)

provides as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity...

If the Government satisfactorily proves defendants' participation in or conduct of the enterprise's affairs through a pattern of racketeering activity as the statute requires, the Government will have satisfied the "associated with" requirement. U.S. v. Biaggi, 672 F.Supp. 112, 121 (S.D.N.Y. 1987) citing Alfaro v. E.F. Hutton Co., 606 F.Supp. 1110, 1116 (E.D. Pa. 1985). Whether or not defendants and their actions constituted an enterprise, or were associated with an enterprise, are matters of fact which the Government must prove at trial. Quite simply, as the cases demonstrate, courts have offered guidance in construing the statute.

Again, it should be noted, that a void for vagueness issue was not raised in H.J., Inc. One such claim had been recently raised and rejected by the Supreme Court in Fort Wayne Books, Inc., 109 S.Ct. 916 (1989); 1989 U.S. LEXIS 648 (1989); 103 L.Ed.2d 34 (1989), with respect to a similar Indiana statute which used state obscenity statutes as predicate offenses. In Fort Wayne Books, Inc., 109 S.Ct. 916 (1989), the defendant was charged with RICO offenses under the Indiana statute where the underlying acts were violations of the state's obscenity statutes. The Indiana statute had been modeled after the federal RICO statute. On appeal, the defendant challenged the use of state obscenity statute violations as a basis for the state RICO prosecution and challenged the state RICO statute itself on vagueness grounds. The Supreme Court held in Fort Wayne Books, Inc. that "if the [predicate offenses are] not unconstitutionally vague, [RICO] cannot be vague either." Accord United States v. Ruggiero, 726 F.2d 913, 923 (2d Cir. 1984), cert. denied, 469 U.S. 831 (1984).

Defendants in the instant case, unlike the defendant in Fort Wayne Books, Inc., make no claim that the predicate offenses here (mail and wire fraud) are themselves unconstitutionally vague. This court will not disregard settled case law in this area. In this case defendants are charged with predicate mail fraud and wire fraud offenses. What constitutes mail fraud and wire fraud is well defined in this Circuit and the mail fraud and wire fraud statutes. Defendants, taking up Justice Scalia's invitation, urge this court to consider Justice Scalia's warning in H.J. as a self-fulfilling prophecy wholly applicable in the instant situation and to declare the RICO statute void for vagueness. Under the due process vagueness doctrine

> The relevant inquiry is whether the statute is so vague that a person could not reasonably understand that the contemplated conduct, as charged in the Indictment, would be proscribed by the statute ...[and] [i]n determining the sufficiency of the notice a statute must, of necessity, be examined in the light of the conduct with which a defendant is charged.

United States v. Boffa, 513 F.Supp. 444, 461 (D.Delaware 1980) (emphasis added); See United States v. Harriss, 347 U.S. 612 (1953) (defendant must show that statute is vague as applied to specific conduct charged against him). Accord, New York v. Ferber, supra, 458 U.S. 747, 767-68 (1982); United States v. Powell, 423 U.S. 87, 92-94 (1975); United States v. Mazurie, 419 U.S. 544, 550, 553 (1975); National Dairy Corp., 372 U.S. 29, at 31-33, 36 (1963). See also United States v. Cintolo, 818 F.2d 980, 996-97 (1st Cir. 1987); United States v. Smith, 680 F.2d 255, 258-59 (1st Cir. 1982). The test the court is concerned with here is whether the statute conveys an adequate warning as applied in a specific situation. United States v. Parness, 503 F.2d 430, 442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

Since the specific allegations in the indictment here and settled precedent remove this case from Justice Scalia's foreboding analysis, this court declines defendant's invitation.

The court holds that the relevant governing constitutional principles and settled precedent control this issue and that the RICO statute is constitutional as applied to the defendants in the instant case.

2. Environmental Crimes as Predicate Acts

Defendants argue that the "gravamen of this indictment is unquestionably the commission of environmental crimes." Defendants' Joint Memorandum of Law in Support of Their Motions ("Jt. Memo") at 13. They point specifically to the indictment's characterization of their participation in the conduct of the alleged RICO enterprise as consisting of the operating of an illegal landfill and the illegal "'transferring, storing and disposing of medical and infectious waste.'" Jt. Memo at 13, citing the indictment at Paragraph 10. Defendants then observe that environmental crimes are not found in the statutory list of offenses that can constitute predicate racketeering activity under the RICO statute. They contend that the Government has circumvented the express limitations of RICO by characterizing defendants' alleged environmental misconduct as mail or wire fraud. Citing the concerns expressed by the Second Circuit in United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S.Ct. 53 (1989), defendants claim that the instant indictment pushes RICO beyond its outer limits and ask that Racketeering Acts 1-2 and 5-22 be dismissed. The court disagrees and denies the request.

The question of whether mail or wire fraud is properly alleged in the instant indictment is addressed below. Defendants argue, however, that regardless of whether mail or wire fraud is properly alleged, Racketeering Acts 1-2 and 5-22 should be dismissed. This position simply ignores the language of the RICO statute which includes mail and wire fraud as predicate acts constituting racketeering activity. 18 U.S.C. Section 1961(1). The allegations of mail and wire fraud are not invalidated as predicate acts because the alleged enterprise is accused of violations of environmental laws as well.

Nothing in the decisions of this Circuit suggests that mail or wire fraud, properly alleged, in the conduct of an enterprise cannot be included as racketeering activity because the enterprise is alleged to have engaged in violations of regulatory schemes which do not constitute racketeering activity on their own. As the

Government explains, the decision in United States v. Porcelli, 865 F.2d 1352 (2d Cir.), cert. denied, 110 S.Ct. 53 (1989), actually undermines defendants' argument. In Porcelli, the Government sought to use the mail fraud statute to prosecute a state sales tax evader under RICO where the tax evasion involved did not even violate any state criminal statutes. The Court approved this use of mail fraud as racketeering activity "by virtue of the extraordinarily broad sweep of RICO and the federal mail fraud statute." Id. at 1355. Contrary to defendants' contention, the existence of environmental regulatory schemes, including criminal penalties, does not somehow "preempt" the use of properly stated allegations of mail fraud as racketeering activity in charging a violation of RICO because violations of that environmental regulatory scheme are also implicated. The indictment in this case is not merely an instance of the Government using the mail fraud statute, and thereby RICO, to add counts "in an indictment the gravamen of which was the violation of other federal criminal statutes." United States v. Mangan, 575 F.2d 32, 49 (2d Cir.), cert. denied, 439 U.S. 931 (1978), citing United States v. Dixon, 536 F.2d 1388, 1398-1401 (2d Cir. 1976). No other federal criminal violations are listed in the counts of the indictment, and, as explained below, the mail fraud and RICO counts are properly alleged.

The Second Circuit's decision in United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) in no way undermines a broad approach to the use of mail fraud as a RICO predicate. In that case, the

Court found no "enterprise" because the defendants, Croatian nationalists, were seeking to advance political goals, not to make a profit. Clearly, defendants in the instant case are alleged to have participated in a profit-making enterprise.

3. Sufficiency of the Evidence of Counts Three Through Eight

Defendants argue that, as a matter of law, there is insufficient evidence alleged in the indictment for mail fraud against the City of New York. Defendants observe that in a mail or wire fraud prosecution, the Government must allege a "scheme or artifice to defraud," and that the Government must offer proof that defendants possessed a "fraudulent intent," and, specifically, that defendants contemplated some actual harm to their victims. Misrepresentation amounting to deceit but without contemplated harm does not constitute mail or wire fraud. See United States v. Starr, 816 F.2d 94 (2d Cir. 1987); United States v. Regent Office Supply, 421 F.2d 1174 (2d Cir. 1970).

In Counts 3-8, defendants are charged with scheming fraudulently to deprive the City of licensing and dumping fees. Defendants argue that the Government's allegations rest on the assumption that defendants were under an obligation to dump in City landfills and that by not doing so they were depriving the City of fees. Defendants then contend that since no such obligation to dump, and hence no obligation to pay fees, existed, the was no "'discrepancy between benefits reasonably anticipated because of the misleading representations [i.e. payment of fees] and the actual benefits which the defendants delivered, or intended to deliver.'" Jt. Memo at 20, citing Regent Office Supply Co., 421 F.2d at 1182. The court disagrees.

The Second Circuit has established that "an indictment need do little more than to track the language of the statute charged and state the time and place ... of the alleged crime." United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir.) (citations omitted), cert. denied, 423 U.S. 832 (1975). See United States v. Citron, 783 F.2d 3307, 3314 (2d Cir. 1986); United States v. Covino, 837 F.2d 65 (2d Cir. 1988); United States v. Carr, 582 F.2d 242, 244 (2d Cir. 1978). The instant indictment clearly meets this test. As shown below, the indictment makes factual allegations which the Government will have to prove at trial concerning misrepresentations by defendants and their intentions to deprive the City of licensing and dumping fees. In so alleging, the Government has satisfied its responsibilities at this stage. It is, as the Government states, well established that an "indictment returned by a legally constituted and unbiased grand jury, ... if valid on its face, is enough to call for trial of the charge on the merits." Costello v. United States, 350 U.S. 359, 363 (1956); see United States v. Scacchetti, 668 F.2d 643, 646 (2d Cir.), cert. denied, 457 U.S. 1132 (1982). As this court has stated, per Judge Weinfeld, a facially sufficient indictment "is not subject to dismissal on the basis of factual questions, the resolution of which must await trial." United States v. Black, 291 F.Supp.

262, 264 (S.D.N.Y. 1968).

The problem with defendants' argument is that the indictment is not flawed on its face. The Government has properly alleged that defendants engaged in a scheme to defraud the City of licensing and dumping fees through the use of misrepresentations concerning their intentions to operate a landfill legally within the City. According to the indictment, defendants alleged misrepresentations concerning the nature of their landfill operation served a scheme in which they dumped illegally within the City. In dumping illegally within the City, the indictment alleges, defendants did not pay fees they would have been obliged to pay had they dumped legally within the City. The Government need not allege a contractual or fiduciary obligation to dump within the City to assert that those who have in fact dumped evaded paying fees associated with legal dumping operations. Whether Defendants actually committed such misrepresentations, whether they conducted such an illegal dumping operation, and whether they would otherwise have dumped legally within New York City are questions of fact to be proved by the prosecution at trial.

Defendants reliance on the Second Circuit's decision in United States v. Starr, 816 F.2d 94 (2d Cir. 1987), is unavailing. In Starr, the Second Circuit reversed a conviction where it held evidence of mail fraud to be insufficient because the court found no evidence that the defendants had intended to harm the customers they had deceived. While Starr establishes rules of law concerning the requirements of proof under the mail fraud statute, it, like the Second Circuit's decision in United States v. Regent Office Supply, 421 F.2d 1174 (2d Cir. 1970), addresses the evidence that the Government in fact presented at trial, not the allegations on the face of the indictment. In Starr, the court essentially found that the Government had identified the wrong party as the victim; in Regent Office Supply, the court found that the defendants deceived the alleged victims but not in a way which, on the facts presented at trial, evidenced an intent to harm them. Under both these cases, therefore, the Government will be required at trial to proffer sufficient evidence of an intent by defendants to harm the City of depriving it of fees. See, e.g., United States v. Gelb, 881 F.2d 1155, 1162-63 (2d Cir. 1989) (distinguishing Starr where defendants charged with depriving Postal Service of postage). However, it is not for this court to anticipate whether the Government's evidence on this or any other material issue will prove sufficient.

The court therefore declines to dismiss the counts in question in the instant indictment, leaving it to the Government to proffer sufficient evidence of intent to defraud at trial.

4. The Conduct Alleged Constitutes Mail Fraud under McNally

Defendants argue that, with the exception of Racketeering Acts 3 and 4, the conduct alleged in the instant indictment does not constitute mail fraud under the Supreme Court's decision in McNally v. United States, 483 U.S. 350 (1987), because the alleged victims were not deprived of money or property. Specifically, with respect to the allegations of mail fraud against the City and State, defendants argue 1) that permits are not property within the meaning of the mail fraud statute as interpreted under McNally and 2) that the Government's allegation that defendants fraudulently schemed to deprive the City and State of licensing fees is factually and legally specious because defendants, in fact, paid licensing fees and therefore did not deprive the City of money. In sum, defendants argue that any injury suffered by the City or State was in their capacity as regulators not property holders and was, therefore, not a cognizable deprivation under the mail fraud statute. They therefore request that Racketeering Acts 1-2, 5-12 and Counts 3-8 be dismissed.

Defendants also maintain that the Government has not alleged a scheme to deprive generators of medical waste of money or property as required in McNally. Defendants contend that, as they argue with respect to Counts 3-8, there is insufficient evidence as a matter of law to support the charge that defendants intended to deprive the medical waste generators in question of any money or property. In short, defendants, at worst, deprived these waste generators of the "intangible right to honest services," a deprivation not recognized under McNally. Defendants deny, inter alia, that their alleged actions exposed these generators to civil or criminal liability. They also maintain that the indictment alleges no new misrepresentations after November 18, 1988, the effective date of the provision making deprivation of the "intangible right of honest services," a violation of the mail fraud statute.[**] Defendants therefore request that Racketeering Acts 13-22 and Counts 9-11 be dismissed.

In McNally v. United States, 483 U.S. 350, 356 (1987), the Supreme Court held that the federal mail fraud statute "clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." Congress subsequently amended the statute by enacting 18 U.S.C. Section 1346, effective as of November 18, 1988, which provides that "the term 'scheme or artifice to defraud' [as used in the mail fraud statute] includes a scheme or artifice to deprive another of the intangible right of honest services." Much of the conduct at issue in the instant case occurred before the enactment of Section 1346. The Government does not deny the applicability of McNally to the mail fraud allegations before November 18, 1988, but insists that the indictment alleges a scheme to defraud the City and State and various medical waste generators of money or other property.

[**] As the court agrees with the Government's contention that it has properly alleged a deprivation of property of the medical waste generators, there is no need to analyze the post-amendment mailings alleged.

For the following reasons, the court agrees with the government and denies defendants' requests to dismiss the Racketeering Acts and Counts in question.

While the McNally Court required an intended property deprivation, it did not define property. In Carpenter v. United States, 484 U.S. 19 (1987), However, the Court made it clear that both tangible and intangible property are included under McNally. See also United States v. Grossman, 843 F.2d 78, 86 (2d Cir.), cert. denied, 109 S.Ct. 864 (1988) (law firm has property interest in confidential information). The relevant inquiry under McNally, therefore, is not whether the interest in question is tangible or intangible, but whether it is a property interest and not merely an interest in honest services.

Citing several cases from other circuits, defendants contend that permits, licenses, and contracts awarded by government agencies are not property under the mail fraud statute. however, this position is not supported by the weight of case law within this Circuit. In United States v. Biaggi, 675 F.Supp. 790, 801-02 (S.D.N.Y. 1987), for example, this court held that the right of a government agency to award millions of dollars in contracts is a property interest under the mail fraud statute. As this court observed in Biaggi, id. at 800-01, the McNally Court, in describing ways the jury was not charged in that case, implied that the federal mail fraud statute includes schemes 1) to defraud the Government of money or property, 2) to have the Government pay more for a service or for poorer service than otherwise, or 3) to deprive the Government of control over how it spends its money. See McNally, 483 U.S. at 360.

This third possible basis for a mail fraud claim, deprivation of control over the spending of money, served as the basis for this court's decision in Biaggi and applies as well to the State permit in the case at hand. As the Government argues, the licensing scheme for medical waste implicates far more than the Government's mere regulatory interests because of the State's exposure to the costs of cleaning up hazardous waste improperly disposed of. The issuance of permits directly protects the State's money. When the State loses control over the disbursement of permits because of fraud, it is effectively being deprived of control over the expenditure of its money.

Other courts in this Circuit have reached similar results following the _Biaggi_ decision. In _United States v. Turoff_, 701 F.Supp. 981 (E.D.N.Y. 1988), Judge Glasser held that taxi medallions wrongfully taken from the City are property. In _United States v. Berg_, 710 F.Supp. 438 (E.D.N.Y. 1989), Judge Platt held that licenses to export arms from the United States are property. But see United States v. Ferrara, 701 F.Supp. 39, 42 (E.D.N.Y. 1988) (licenses to practice medicine not property for purposes of mail fraud statute), aff'd without opinion, 868 F.2d 1268 (2d Cir. 1988). In contrast, other circuits have found various licenses and permits not to be property for purposes of the mail fraud statute. See United States v. Kato, 878 F.2d 267 (9th Cir. 1989) (pilots' licenses not property); United States v. Toulabi, 875 F.2d 122 (7th Cir. 1989) (taxi drivers' licenses not property); United States v. Murphy, 836 F.2d 248 (6th Cir.) (bingo permits not property), cert. denied, 109 S.Ct. 307 (1988). However, none of these licenses or permits implicates the governmental budget, at least in as direct a way as is present in this case. Also, each of these decisions seems to regard the licenses or permits in question as property, in fact, items of significant value, in the hands of the recipients, but not in the hands of the Government. This position directly contradicts the implication of McNally, as developed in Biaggi, that the Government has a property interest in control over the expenditure of its money, and hence over the distribution of items of value.

Defendants' reliance on the Second Circuit's decision in United States v. Evans, 844 F.2d 36 (2d Cir. 1988), is misplaced. Evans held that the federal government has no property interest in the resale or retransfer of U.S. military weaponry from one foreign nation to another. This holding does not conflict with the view that a government agency has a property interest in the disbursement of its resources. It merely establishes that, under some circumstances, it does not have a property interest in their future alienation once disbursed.

In addition, as the Government observes, defendants' allegedly fraudulent means of obtaining the permits in question were part of an alleged scheme to defraud the Government of actual fees and to defraud others of money and other property interests as well. The court now turns to those allegations each in turn.

Defendants characterized the Government's allegations that they schemed to defraud the City and State of licensing fees, as opposed to licenses, as "juridical hairsplitting." This court cannot agree. According to the Government, defendants never acquired licenses, and, therefore, did not pay the appropriate licensing fees for the kind of landfill they actually operated. While the Government admits that defendants did, in fact, pay licensing fees, it contends that those fees were not paid for the kind of operation conducted. Therefore, the Government was deprived of fees for the actual operation. Clearly, schemes to defraud government agencies of money in the form of fees can properly be charged under the mail fraud statute. See United States v. Gelb, 881 F.2d 1155, 1162-63 (2d Cir. 1989); United States v. Porcelli, 865 F.2d 1352, 1359-62 (2d Cir. 1989); United States v. King, 860 F.2d 54 (2d Cir. 1988), cert. denied, 109 S.Ct. 2062 (1989); Ingber v. Enzor, 664 F.Supp. 814, 822 (S.D.N.Y. 1987), aff'd, 841 F.2d 450 (2d Cir. 1988). The fact that the agencies received other fees does not give cause to dismiss the Government's charges with respect to the unpaid fees.

Defendants' reliance on the Second Circuit's decision in Corcoran v. American Plan Corp., 886 F.2d 16, 20-22 (2d Cir. 1989) is unavailing. In that case, the court found that the plaintiff, the State Superintendent of Insurance, had not even attempted to allege that the State had any property interest in the money allegedly stolen by the defendants.

In addition, defendant's alleged fraudulent evasion of licensing fees threatens other pecuniary interest of the City and State. By allegedly evading licensing fees, defendants sought to sidestep a licensing system which safeguards substantial monetary interest of the City and State. As the Government indicates, state and local regulations expose the City and State to paying the costs of cleaning up environmental disasters such as those alleged here. See, e.g., N.Y. Envtl. Conserv. Law, Article 27, Title 13; N.Y.C. Admin. Code, Title 24, Chapter 6. If the property owners cannot clean up such a disaster, the City and State will be required to do so at great cost. Such exposure falls within the coverage of the federal mail fraud statute.

Defendants' arguments concerning the deprivation of dumping fees repeat those made to request dismissal of Counts 3-8; that there is insufficient evidence as a matter of law that defendants intended to defraud the City of dumping fees. For the reasons given above, this argument fails to persuade.

Finally, defendants contend that the indictment fails to allege a scheme to defraud the generators of medical waste of property. Defendants argue that they are accused of scheming to deprive their medical waste customers of the honest services for which they thought they were contracting, i.e. dumping their waste at approved sites. Relying on United States v. Starr, 816 F.2d 94 (2d Cir. 1987) and United States v. Regent Office Supply, 421 F.2d 1174 (2d Cir. 1970), defendants claim that it is not enough for the Government to allege that these customers were deceived with respect to the bargain they were entering with these defendants. They also claim that these customers were not exposed to any potential liability by defendants' alleged use of unapproved sites.

Once again, the decisions in Starr and Regent Office Supply, prove unavailing to defendants. In both of these cases, the Second Circuit examined the evidence presented by the Government at trial and found it insufficient to show harm to the customers. The court did not hold that as a matter of law one cannot scheme to defraud a customer by misrepresenting a material part of a bargain. Whereas the Government failed to show that the customers in _Starr_ and in _Regent Office Supply_ did not receive the services they paid for, the Government may be able to do so at trial here. In the instant case, unlike those relied on by defendants, the customers arguably bargained for a highly specialized kind of service, the legal dumping of the medical waste they generated. The value of legal dumping to a generator of medical waste arguably might lie in its importance to its business reputation or in potential exposure to civil or criminal liability. As the McNally Court implied, if the alleged victim would have paid less or received better quality services absent the alleged deceit, then mail fraud has been properly charged. See McNally v. United States, 483 U.S. at 360. These are questions of fact to go to the jury.

The Second Circuit's decision in United States v. Covino, 837 F.2d 65 (2d Cir. 1988) is also not helpful to defendants. In that case, where the defendant was charged, inter alia, with wire fraud for violating his fiduciary duty to his employer, the court found that the indictment did not ask the jury to find that the alleged victim had been defraud of money or property. It therefore reversed the wire fraud convictions. Id. at 71. Clearly, in the instant indictment, the Government has alleged a scheme to deprive the medical waste generators of property and money, not merely of some fiduciary duty to dispose of the waste as promised.

In addition, while defendants claim that their alleged victims were not exposed to liability, close examination of state and local law in the relevant time period indicates otherwise. Since 1985, disposal of potentially infectious waste has been governed by provisions of the Administrative Code, currently Section 16-120.1, originally enacted as Local Laws 57 and 90. This law provides, inter alia, for suspensions and fines for violations of the municipal regulatory scheme. Similarly, starting in August, 1988, the State of New York issued and reissued emergency regulations, 6 NYCRR Section 364.9 (now authorized under N.Y. Envtl. Conserv. Law, Article 27, Sections 1504 and 1510 (McKinney 1990)), which regulated disposal of infectious waste and established a manifest system which generators of such waste were obliged to use. Under a state statute passed in July, 1987, 1987 N.Y. Laws Ch. 431, and amended in November, 1988, 1988 N.Y. Laws Ch. 654, (codified as amended at N.Y. Envtl. Conserv. Law, Article 71, Section 2703 (McKinney 1990)), generators of infectious waste who violated the requirements of these disposal regulations were exposed to civil and criminal penalties. Defendants' alleged activity, therefore, did expose their customers to potential liability.

For the foregoing reasons, Defendants' request that Racketeering Acts 13-22 and Counts 9-11 be dismissed is denied.

5. Failure to Allege a Proper "Enterprise"

Counts 1-2 of the indictment allege that Defendants -- four individuals, two partnerships and six corporations -- and their co-racketeers constituted an "enterprise" as defined by 18 U.S.C. Section 1961(4), that is, a group of individuals and corporations associated in fact although not a legal entity. Defendants seek to dismiss both counts on the ground that the enterprise charged is not a proper enterprise within the meaning of the RICO statute. Specifically, defendants contend that the enterprise alleged is invalid because it consists exclusively of defendants; they assert that the law prohibits a single entity from being both a defendant and the enterprise itself. Defendants also argue that a group of corporations and individual people cannot be an enterprise under RICO. The court rejects both of these arguments.

As the Second Circuit held in Cullen v. Margiotta, 811 F.2d 698, 729-30 (2d Cir.), cert. denied, 483 U.S. 1021 (1987), there is "no reason why a single entity could not be both the RICO person and one of a number of members of the RICO 'enterprise.'" As the court observed, the language of 18 U.S.C. Section 1962(c) appears to envision that the same entity might be both a RICO "person" and one member of the "enterprise," by speaking of a "person ... associated with any enterprise." Id. at 730. That the indictment names many, or even all, of the persons in an alleged enterprise makes it thorough, not improper.

Defendants' reliance on Bennett v.

United States Trust Co., 770 F.2d 308 (2d Cir. 1985), cert. denied, 474 U.S. 1058 (1986), is misplaced. In that case, the Second Circuit held that "a solitary entity cannot, as a matter of law, simultaneously constitute both the RICO 'person' whose conduct is prohibited and the entire RICO 'enterprise' whose affairs are impacted by the RICO person." Cullen, 811 F.2d at 729, citing Bennett, 770 F.2d at 315. In Bennett, the court rejected the notion that an entity may be regarded as "associated with" itself alone. Id. As the Second Circuit noted in Cullen, 811 F.2d at 730, such a holding in no way precludes the charging of entities as associated with an enterprise of which they are part. That is precisely what the instant indictment does. That the entities named in it as "persons" are alleged to be members of the same enterprise, therefore, does not invalidate the RICO counts.

Defendants' claim that a RICO enterprise cannot include an association in fact of business and human entities is also without foundation. Nothing in the language of the statute suggests an intent to exclude this perhaps rather common form of association. If anything, the statute is broadly inclusive. The statute defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. Section 1961(4). This definition does not exclude an association in fact consisting of different types of entities, such as a combination of the enumerated types of entities. Such a suggested reading would perversely insulate more complex, though perhaps not uncommon, types of enterprises. In addition, the Second Circuit has held that a group of corporations may constitute a "group of individuals associated in fact" under Section 1961(4). United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979) (group of corporations constituted "association in fact" enterprise), cert. denied, 445 U.S. 927 (1980); see also Porcelli, 865 F.2d 1352, 1364 (2d Cir.) (group of twelve operating companies, realty companies and a management company constituted enterprise), cert. denied, 110 S.Ct. 53 (1989). The enterprise alleged in the instant indictment consists of individuals, corporations, and partnerships associated in fact. The court finds nothing improper in this allegations.

6. Severance

Defendants Paccione and Vulpis move for a severance from the trial of co-defendant McDonald on two grounds: 1) that it is required under Bruton v. United States, 391 U.S. 123 (1968), due to statements of defendant McDonald that the Government apparently intends to use at trial, and 2) that the defenses available to defendants Paccione and Vulpis, on the one hand, and to defendant McDonald, on the other, are antagonistic and mutually exclusive, such that all defendants would be deprived of a fair trial if tried together. The court will address each of these arguments in turn.

On July 19, 1989, defendant McDonald was interviewed at his home by two agents of the FBI.[***] During the interview, McDonald allegedly made various statements linking himself and defendants Paccione and Vulpis to the ownership and running of defendants New York Environmental Contractors, Inc. ("NYEC") and A&A Land Development ("A&A"). These defendants are among those charged with dumping illegal waste materials and with not dumping other waste materials at City and State approved dumping facilities.

Defendants Paccione and Vulpis argue that the admission of even redacted versions of these statements at a joint trial would violate their right to confront McDonald under Bruton v. United States, 391 U.S. 123 (1968), and its progeny. Specifically, defendants assert that any attempt to redact McDonald's alleged statements would be "ineffective and patently unfair" to one or more of the defendants. They contend that the substitution of the phrase "another person" for the names of the defendants would still allow the Government to link those defendants to the alleged criminal activity.

[***] Defendant McDonald has moved to suppress the statements made in that interview. For the reasons given below, that motion is denied.

Alternatively, defendants Paccione and Vulpis ask for a complete deletion of any reference to anyone other than McDonald, so as not to connect them to the alleged crimes. However, they warn, correctly, that such a redaction might have an adverse impact on McDonald's rights.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that a defendant is deprived of the right to confront witnesses when a nontestifying codefendant's confession naming the defendant as a participant in the crime is introduced at their joint trial, even if the jury is instructed only to consider the confession against the codefendant. However, in Richardson v. Marsh, 481 U.S. 200 (1987), the Court held that the Confrontation Clause permits the use of a codefendant's confession at a joint trial where the confession is redacted to omit any reference to the defendant, even though the defendant is nonetheless linked to the confession by evidence properly admitted against that defendant at trial, and where the jury is given a proper limiting instruction. Since Richardson, the Second Circuit has held "that a redacted statement in which the names of co-defendants are replaced by neutral pronouncs, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's Bruton rights." United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989). See also United States v. Alvarado, 882 F.2d 645, 652-53 (2d Cir. 1989). In light of these decisions, there is no reason why the Government cannot redact the text in question in a manner which would not violate defendants Paccione and Vulpis's rights under the Confrontation Clause if introduced at a joint trial.

Defendants Paccione and Vulpis also argue that they should receive a severance because their defenses will be "antagonistic" to and "mutually exclusive" of McDonald's defense. Specifically, Paccione and Vulpis contend that they will dispute McDonald's likely assertions concerning responsibility for the running of defendant NYEC. According to defendants, the jury will be asked to believe one version and to disbelieve the other. However, such mutual assertions of responsibility do not make the requisite showing of antagonism. As the Second Circuit has stated, "A simple showing of some antagonism between defendants' theories of defense does not require severance." United States v. Carpentier, 689 F.2d 21 (2d Cir. 1982), cert. denied, 459 U.S. 1108 (1983). There must be an antagonism at the core of the testimony offered on behalf of a defendant. Id. at 28, citing United States v. Berkowitz, 662 F.2d 1127, 1134 (5th Cir. 1981). In Berkowitz, the Fifth Circuit affirmed a denial of a severance motion where each defendant's defense was based on a claim of noninvolvement; each cast the other as the more active participant. Similarly, in the case at bar, the two groups of defendants may choose to point a finger at the other as the more active participant in the alleged enterprise. If so, as in Berkowitz, it will not be necessary for the jury to disbelieve the one in order to believe the other. There are various combinations or degrees of involvement the jury may find credible. With proper protections at trial, defendants will not be prejudiced. Given the foregoing and the strong institutional reasons for preferring a joint trial, the motion for a severance is denied.

7. The Search Warrants Were Entirely Lawful

On September 15, 1988, the

Honorable A. Simon Chrein, United States Magistrate, Eastern District of new York issued six search warrants for the following premises: (1) the Port Ivory landfill, Staten Island New York; (2) the National Carting Transfer Station, 6401 9th Avenue, Brooklyn, New York; (3) the Rosedale Carting Transfer Station, 96-14 Ditmas Avenue, Brooklyn, New York; (4) the Mill Basin Transfer Station, Flatlands Avenue and East 58th Street, Brooklyn, New York; (5) the Red Ball Interior Demolition Transfer Station, 625/635 West 29th Street, New York, New York; and (6) the Mill Basin Contracting Offices, located at 1379 Utica Avenue, Brooklyn, New York. On the same day, the Honorable Michael Dolinger, United States Magistrate, Southern District of New York, issued two search warrants for the following premises: (1) the Red Ball Interior

Demolition Transfer Station, located at 625-635 West 29th Street, New York, New York; and (2) the Red Ball Interior Demolition Offices, located at 575 Washington Street, New York, New York. (hereinafter collectively referred to as the "the September 15 warrants.")

Each of the September 15 warrants authorizing a search of a premise containing office space called for seizure of the following:

> business records including but not limited to: permit applications and permits; agreements and contracts regarding land use; lists, correspondence, journals and other records naming clients and customers; documents reflecting ownership of property and vehicles on property; receipts and dump tickets; financial records and documents.

The Government maintains that the description of documents to be seized was carefully tailored to satisfy its legitimate interests in investigating wrongdoing, while minimizing the intrusion on any legitimate aspects of defendants' businesses. Defendants charge that the warrants authorized a general search in violation of the Fourth Amendment's particularity clause.

The documents described were relevant to the Government's investigations of each business' activities. Probable cause for the issuance of each of the September 15 warrants was provided by the Affidavit of FBI Special Agent Paul C. McMahon which described in detail the Government's investigation into defendants' operation of an allegedly illegal landfill. Moreover, the McMahon affidavit established ample probable cause to believe that the Port Ivory Landfill was an unlawful operation.

Defendants argue that the search warrants described above constituted impermissible general warrants which failed to particularize sufficiently the items to be seized. This court disagrees. In applying the proper legal analysis, the warrants were sufficiently particularized and descriptive.

It is settled law that a general warrant is one which fails to satisfy the Fourth Amendment's requirement that the warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. The Second Circuit in United States v. Buck, 813 F.2d 588, 590 (2d Cir.), cert. denied, 108 S.Ct. 167 (1987), stated the standard to be followed with regard to the particularization of a search warrant:

> The purpose of the particularity requirement,

the Supreme Court has held, "is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 ... (1971). Moreover, the Court has stated, in an oft-quoted passage, that the particularity requirement "makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 ... (1927). This Court, however, has recognized that these familiar words from Marron "ha[ve] not always been applied literally ... Courts tend to tolerate a greater degree of ambiguity where law enforcement agents have done the best that could reasonably be expected under the circumstances, have acquired all the descriptive facts which a reasonable investigation could be expected to uncover, and have insured that all those facts were included in the

> warrant." United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984), cert. denied, 470 U.S. 1084... (1985).

813 F.2d at 590.

The warrants at issue in the instant case were very detailed. Numerous, clearly delineated items were authorized for seizure at the Port Ivory Landfill, and at the various transfer stations and offices. A warrant authorizing the seizure of a large quantity of accurately described business records at a given location does not pose the danger of giving unbridled discretion to seize to the executing agents; it thus constitutes a valid warrant, so long as it is supported by probable cause. See National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir.) (citing United States v. Brien, 617 F.2d 299, 309 (1st Cir.), cert. denied, 446 U.S. 919 (1980)); United States v.

McClintock, 748 F.2d 1278, 1282-83 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985); United States v. Offices Known As 50 State Distributing Co., 708 F.2d 1371, 1372-75 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984). Defendants do not claim that there was insufficient probable cause to sustain issuance of the warrants, just that the warrants were not sufficiently particularized, and therefore overbroad.

Courts have consistently held that where a business is totally illegal, a search warrant may properly authorize the seizure of all documents of the business. In National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980), the Second Circuit held that "there was probable cause to believe that [the business searched] was permeated with fraud. Accordingly, the agents could properly seize all of the business records ... described in the warrant." Id. at 1026.

The First Circuit, in Brien, held:

> Where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized, if they are, as here, accurately described so that the executing officers have no need to exercise their own judgment as to what should be seized.

Brien, 617 F.2d at 309. Relying on both National City and Brien, the Ninth Circuit held in 50 State Distributing that a warrant authorizing the seizure of a broad category of documents was not a general warrant:

> In this case the government argues that the search warrant met the particularity requirement. It argues ... that the warrant removed discretion from the executing officers in that the warrant essentially authorized seizure of all the business-related books, records, equipment and merchandise on Appellee's premises ... We

> agree. The warrant left the executing officers with no discretion.

United States v. Offices Known as 50 State Distributing Co., supra, 708 F.2d at 1374. Defendants argue on the basis of what they characterize as a defect in this search warrant, yet, the very defect they say exists here did not invalidate the less particularized warrant in 50 State Distributing.

Where a search warrant application establishes probable cause for the existence of a scheme involving widespread wrongdoing, as did the search warrant application at issue here, courts are entitled to authorize searches for an seizures of correspondingly broad categories of documents. Anderson v. Maryland, 427 U.S. 463, 481 n.10 (1976). The breadth of the description of documents to be seized depends on the probable cause which exists for issuance of the warrant.

The warrants at issue here were as particularized as possible, given the nature of the illegal schemes involved and the exhaustive and widespread description of probable cause, as set forth in the McMahon Affidavit. Id. To the extent that any items outside the scope of these valid warrants were seized, the proper remedy would be suppression and return of those items, not suppression of all items seized under the warrant. United States v. Matias, 836 F.2d 744, 747 (2d Cir. 1988); United States v. Dunloy, 584 F.2d 6, 11 n.4 (2d Cir. 1978).

8. Motion To Suppress McDonald's Statements Is Denied

Defendant McDonald, pursuant to Fed. R. Crim. P. 12(b)(3), has moved to suppress statements he made to FBI agents on the grounds that he was not advised of his Miranda rights prior to being interviewed. This court deems his motion frivolous. Two FBI agents, who identified themselves and explained the nature and purpose of the interview, spoke with Mcdonald at his home. Miranda rights attach only when a suspect is in custody. Dunaway v. New York, 442 U.S. 200 (1979). McDonald, who was interviewed voluntarily in his own home, was not in custody. The fact that a criminal investigation has been commenced does not require Miranda warnings in an otherwise non-custodial setting. Beckwith v. United States, 425 U.S. 341 (1976) (taxpayer's home). McDonald relies heavily on United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 931 (1978); however, this reliance is misplaced.

Jacobs stands for the proposition that grand jury witnesses must be advised of their Fifth Amendment rights and their status as "targets" prior to being questioned in the grand jury. McDonald was neither a witness appearing before a grand jury nor had he been served with a grand jury subpoena. Thus, McDonald's motion is denied.

Dated: April 30, 1990
New York, New York

CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------------------------X

UNITED STATES OF AMERICA, : SSS
: 89 CR.
- v - : 446
: (CBM)
ANGELO PACCIONE, :
ANTHONY VULPIS, :
JOHN McDONALD, :
A&A LAND DEVELOPMENT, :
AUGUST RECYCLING, INC., :
NATIONAL CARTING, INC., :
STAGE CARTING, INC., :
NEW YORK ENVIRONMENTAL :
CONTRACTORS, INC., :
ROSEDALE CARTING, INC., :
AND VULPIS :
BROTHERS, LTD., :
:
Defendants. :

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MOTLEY, J.

OPINION

On May 8, 1990, the Government rested its case. Defendants then moved for a judgment of acquittal on all counts pursuant to Fed. R. Crim. P. 29(a). After hearing the arguments of counsel on May 8, 1990, the court orally denied defendants' motions for a judgment of acquittal on all counts with Opinion to follow. This Opinion sets forth the court's reasons for its ruling. It also sets forth the court's finding -- pursuant to United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970) -- with respect to the use of co-conspirator statements as evidence against each defendant.

DISCUSSION

In order to withstand a defendant's motion for a judgment of acquittal on a particular count charged in an indictment, the Government must have introduced evidence in its direct case "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt" on each and every element of the charged offense. United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984).

The Government must also show, by a preponderance of the evidence, that the defendant knowingly and wilfully became a member of and participated in the conspiracy charged in the indictment in order to permit co-conspirator statements to be used as proof against a particular defendant pursuant to Fed. R. Evid. 801(d)(2)(E). United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). "[A] court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted." Bourjaily v. United States, 483 U.S. 171, 181 (1987). The court is permitted "to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case." Id. at 180.

On the basis of the evidence outlined in this Opinion, the court finds that the Government introduced sufficient evidence in its direct case upon which a reasonable jury could find each defendant's guilt beyond a reasonable doubt as to each count charged in the indictment.[1] These same facts are also sufficient to show that the defendants unlawfully, knowingly and wilfully participated in the RICO conspiracy charged in Count Two of the indictment.

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[1] In general, this Opinion will address only those counts of the indictment of which a defendant was found guilty and those racketeering acts which a defendant was found to have committed.

When the indictment charges an offense as both a racketeering act and a substantive count, the court will discuss each of these concurrently. The court now sets out the Government's evidence introduced at trial supporting each charge alleged in the indictment.

I. COUNT I -- RICO

Count One of the indictment charges each defendant with unlawfully, wilfully, and knowingly conducting and participating in the affairs of a racketeering enterprise through a pattern of racketeering activity including mail and wire fraud in violation of 18 U.S.C. Sec. 1962(c). In order to prove that a defendant is guilty of RICO as charged in Count One, the Government must establish, beyond a reasonable doubt, each of the following essential elements of the crime: (1) that an enterprise as alleged in the indictment exists; (2) that the enterprise affected interstate or foreign commerce; (3) that the defendant was associated with or employed by the enterprise; (4) that the defendant unlawfully, wilfully, and knowingly engaged in a pattern of racketeering activity by committing, or aiding and abetting the commission of, at least two acts of racketeering; and (5) that the defendant conducted or participated in the conduct of the enterprise's affairs through that pattern of racketeering activity.

a. Existence of the Enterprise/Effect on Interstate Commerce

The court acknowledges that the first two elements of a RICO offense that the Government must establish beyond a reasonable doubt apply generally to each defendant: the existence of the enterprise as defined by the RICO statute, 18 U.S.C. Sec. 1961(4), and the effect of that enterprise on interstate or foreign commerce.

According to the RICO statute, any "group of individuals [who are] associated in fact although not a legal entity" may constitute an "enterprise." 18 U.S.C. 1961(4). This includes an enterprise which consists of individuals, corporations, and partnerships as alleged in the indictment. United States v. Paccione, No. 89 Cr. 446 (S.D.N.Y. April 30, 1990), citing United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980) (group of corporations constituted "association in fact" enterprise). In addition, a single entity can be both a

RICO 'person' and one of the members of the RICO 'enterprise.' Cullen v. Margiotta, 811 F.2d 698, 729-30 (2d Cir.), cert. denied, 483 U.S. 1021 (1987). The fact that the entities named in the indictment as "persons" are alleged to be constituent members of the same enterprise does not invalidate the RICO counts. United States v. Paccione, No. 89 Cr. 446 (S.D.N.Y. April 30, 1990).

Proof as to the existence of the enterprise charged in the indictment would include facts showing the defendants to be part of an ongoing organization, formal or informal, and that the enterprise functions as a continuing operation with a core of personnel who function as a continuing unit. United States v. Turkette, 452 U.S. 576 (1981); see also United States v. Indelicato, 865 F.2d 1370 (2d Cir.

1989) (en banc), cert. denied, __ U.S. __, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989).

The indictment charges that the defendants were part of a racketeering enterprise whose purposes included the enrichment of the individual defendants and their affiliated partnership and corporations through the operation of an illegal landfill and the disposal of waste materials in violation of federal, state, and local law. In pursuit of its goal, the indictment charges that the enterprise engaged in various illegal activities including avoiding federal, state and city regulations relating to the operation of a landfill and the disposal of waste materials, and defrauding New York State and City of licenses, licensing fees, and dumping fees. In addition, the indictment charges that the enterprise defrauded generators of medical waste by charging them the rates required for the lawful transfer, storage, and disposal of such waste which was higher than the rates actually incurred by transferring, storing, and disposing of the waste unlawfully. In doing so, the indictment alleges, the enterprise exposed these waste generators to potential civil and criminal penalties.

The existence of the alleged enterprise is supported by testimony of government officials who had dealings with defendants Paccione and Vulpis, acting on behalf of the partnership and corporate defendants, as well as the testimony of a government investigator who observed the operations of the defendants.

Allison Lewis-Smith, an official at the New York City Department of

Sanitation ("DOS") whose responsibilities included issuing letters of acknowledgement for clean fill grading operations, testified that defendants Paccione and Vulpis filed an application for a clean fill grading permit in April 1988 on behalf of defendant A&A Land Development, a partnership which was equally owned by Paccione and Vulpis. Lewis-Smith issued a letter of acknowledgement to A&A Land Development for a clean fill grading operation on a parcel of land owned by Kenneth I. Wilpon as Agent, Inc. However, according to the testimony of numerous Government witnesses, Paccione and Vulpis instead used this permit for the disposal of waste on the property owned by CSX Transportation, Inc.

In addition, there was evidence that Paccione and Vulpis, also on behalf of A&A Land Development, caused permits to be issued by the Department of Transportation ("DOT"). Lynn Fealy, permit supervisor at the DOT, testified that Vulpis submitted several applications for street opening permits which showed the purpose of the permit as placing fill. These street opening permits were approved and issued to Vulpis, Paccione, and A&A Land Development. Again, according to numerous Government witnesses, the defendants used these street opening permits in the operation of the landfill.

Evidence that the defendants August Recycling, Inc. ("August"), National Carting, Inc. ("National"), Stage Carting, Inc. ("Stage"), Rosedale Carting, Inc. ("Rosedale"), and Vulpis Brothers, Ltd. ("Vulpis Brothers") were also members of the enterprise can be found in testimony that these companies disposed of waste materials at the A&A landfill site. It is undisputed that August, National, and Stage are owned by Angelo Paccione and that Anthony Vulpis is a co-owner of Rosedale and Vulpis Brothers. Peter Lizzio, an investigator of environmental crimes for the New York City Department of Investigations, testified that during his surveillance of the Arlington yard site from May 1988 to September 1988, he regularly observed numerous trucks belonging to these defendant corporations dumping at the landfill. The videotapes and photographs taken by Lizzio's team support his testimony.

The existence of the enterprise is further supported by evidence of the working relationship between the defendant companies of Paccione and Vulpis. For example, while Coney

Island Hospital entered into an agreement with National, one of Paccione's companies, to have their medical waste removed, the delivery receipts introduced into evidence indicate that Rosedale, one of Vulpis' companies, was the actual shipper of the waste.

The evidence outlined above is sufficient to support an inference that the defendants Paccione and Vulpis and their affiliated defendant partnership and corporations were in fact associated as an ongoing enterprise with a common purpose shown by a continuing operation and core of personnel.

As to the effect of the enterprise's activities on interstate commerce, the Government has introduced evidence that there were numerous phone calls and letters from defendants

Paccione, Vulpis and Weiss on behalf of A&A Land Development to representatives of CSX Realty Corporation, a company which conducts business nationwide, while these representatives were in the CSX Realty offices in Richmond, Virginia. As a result of these correspondences, the CSX representatives took a number of flights from their base office in Virginia to Newark Airport in New Jersey, where they were then brought to the Staten Island landfill site to discuss matters affecting CSX business. According to the evidence in support of racketeering acts 3d and 4a-i, discussed below, the enterprise schemed to defraud CSX Transportation, a company headquartered in Florida, of the value of its New York property.

Moreover, in a tape recorded meeting with Allison Lewis-Smith of the

DOS, Paccione said that the defendants were transporting the medical waste they picked up from generators to a facility in South Carolina. However, the testimony of numerous Government witnesses indicates that most of the waste was never transported to this facility. Instead, according to those witnesses, the defendants transported the waste to other locations, including the Staten Island landfill.

The remaining elements of a RICO offense -- association with or employment by the enterprise; knowing, wilful and unlawful commission of a pattern of racketeering activity; and participation in the conduct of the enterprise's affairs through that pattern of racketeering activity -- requires specific application as to each defendant.

b. Association with the Enterprise

The evidence set forth in this Opinion concerning the existence of the enterprise and the defendants' participation in it is also sufficient to support the inference that each of the defendants was aware of the existence of the criminal enterprise, was associated with and employed by the enterprise, and knowingly and intentionally participated in the enterprise's illegal activities.

c. Pattern of Racketeering Activity

The fourth element of a RICO offense which the Government must prove beyond a reasonable doubt is that a defendant unlawfully, wilfully, and knowingly engaged in a pattern of racketeering activity with the intention of furthering the goals of the enterprise. This is achieved by committing or aiding and abetting the commission of at least two acts of racketeering by common participants, victims, methods, purposes, or results and demonstrating a threat of continued racketeering activity, if not continuity in fact. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. __, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); see also, United States v. Indelicato, 865 F.2d 1370, 1382 (2d Cir. 1989) (en banc), cert. denied, __ U.S. __, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989).

The racketeering acts charged in the indictment all involve violations of either mail fraud or wire fraud on the part of the defendants. The statute that establishes the mail fraud offenses charged in Counts 3-12 and Racketeering Acts 1(a-e), 2, 3(a-e), 4(a-c), 5-11, 12(a-c), and 13-17 of the indictment is Title 18, United States Code, Section 1341 which provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be [guilty of a crime].

The statute that establishes the wire fraud offenses charged in Racketeering Acts 3(f) and 4(d-i) of the indictment is Title 18, United States Code, Section 1343 which provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining

> money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire ... in interstate ... commerce, any ... sounds for the purpose of executing such scheme or artifice, shall be [guilty of a crime].

With respect to mail fraud, to convict a defendant of any particular mail fraud count or find a defendant guilty for the racketeering act of mail fraud, the Government must establish beyond a reasonable doubt three elements as to that charge.

The first element requires that there be a fraudulent scheme. This necessitates that at some point during the time period alleged in the charge, there existed a scheme to obtain money or property by means of false or fraudulent pretenses, representations, or promises. U.S. v. Starr, 816 F.2d 94, 98 (2d Cir. 1987).

The second element requires that the defendant acted intentionally and deliberately in carrying out the fraudulent scheme. The defendant must have knowingly and wilfully devised or participated in the fraudulent scheme, with knowledge of its fraudulent nature and with the intent to defraud. Id.

The third and final element requires that the execution or attempted execution of this fraudulent scheme involved at least one use of the United States mails. The use of the mails, however, does not have to be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the fraudulent scheme. Schmuck v. United States, 489 U.S. __, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989).

To constitute mail fraud, the alleged victims must be deprived of some money or property rights, not just of an interest in honest services. McNally v. United States, 483 U.S. 350, 356 (1987); see also, United States v. Evans, 844 F.2d 36 (2d Cir. 1988). These money or property rights include both tangible and intangible property interests. Carpenter v. United States, 484 U.S. 19 (1987). The intangible property interests protected by the mail and wire fraud statute also include the right of a government agency to award permits, licenses, and contracts and, in turn, the right of the government agencies to the fees from these licenses, as held by this court in United States v. Paccione, No. 89 Cr. 446 (S.D.N.Y. Apr. 30, 1990); see also United States v. Biaggi, 675 F.Supp. 790, 800-02 (S.D.N.Y. 1987), aff'd, No. 88-1530, slip op. 5195, 5240-41 (2d Cir. June 29, 1990).

We now turn to the racketeering acts charged in the indictment.

1. Racketeering Acts 1c - 1e/Counts 5-7: Mail Fraud on Departments of Transportation and Sanitation

The indictment charges that defendants Paccione, Vulpis and their affiliated partnership and corporations engaged in a scheme to defraud the City of New York of money from licensing fees for the landfill operation at the Arlington Yard and from dumping fees to be derived from the lawful disposal of waste materials at the City-owned landfill at Fresh Kills. According to the indictment, the defendants accomplished this by making false and fraudulent representations to the DOT and DOS in order to obtain permission to operate the Arlington Yard landfill.

The mailings specifically alleged in the indictment in Racketeering Act

1c and 1d and simultaneously in Counts 5 and 6 are street opening permits No. 54468 and No. 54552, issued by the DOT and mailed to the DOS. The Government alleges that the defendants used these permits as a cover for the illicit disposal of waste at the Arlington Yard landfill and to avoid paying licensing fees for the fill operation actually conducted.

Lynn Fealy, permit supervisor at the DOT, testified that Paccione and Vulpis came to her office in April 1988 on behalf of A&A Land Development and applied for a street opening permit for the Arlington Yard landfill site. The application lists the purpose of the permit as placing fill on the property. The Government introduced evidence, however, that the defendants did not only place fill on the property but used this permit to place garbage and other material at the site. Fealy testified that she issued the permit based on the information given to her by the defendants.

The Government's allegations with respect to the material placed at the Arlington Yard site are supported by the testimony of Peter Lizzio who investigated environmental crimes for the New York City Department of Investigations and who investigated the Arlington Yard property from May 1988 to September 1988. Lizzio's testimony is corroborated by photographs and videotapes taken by his staff and introduced into evidence by the Government. Lizzio testified that on several occasions during May 1988, he observed numerous trucks dumping at the landfill. He also testified that during surveillance in May, he noted two excavating operations occurring simultaneously at the site. During the month of June, Lizzio continued his surveillance of the landfill site and observed trucks moving around at the landfill before dawn on several occasions. As it became light, he saw these trucks dumping garbage, construction, and demolition debris. Lizzio also testified that he noted trucks registered to defendants August, Rosedale, and Vulpis Brothers containing garbage mixed with construction and demolition debris all dumping at the site during the month of June and that this activity was occurring on land owned by CSX Corporation.

Lizzio continued his surveillance in July and August of 1988 and testified that he observed numerous trucks on the landfill and excavation activity occurring on the site during this time. Surveillance videotapes from this period introduced into evidence show defendant Vulpis at the site, at times apparently directing the dumping of garbage and construction and demolition debris. Lizzio also testified that he saw a number of trucks dump consistently during the summer of 1988. He identified these trucks as coming from the Rosedale transfer station and from the National and Stage transfer station. According to Lizzio, after the garbage was dumped, it was then bulldozed into pits and covered by a reddish clay material. This activity usually occurred in the morning hours.

Fealy also testified that there is a fee that is required to be paid when an application for a street opening permit is made. The fee is calculated by the number of cubic yards of fill that will be placed on the property. The defendants stated on the street opening permit application that approximately 132,000 cubic yards of fill would be placed on the site. The DOT relied on this information in charging the amount for permit fees. However, Dennis Rubin, partner at Woodward-Clyde, an engineering and environmental consulting firm, testified that the stockpile contained approximately 550,000 cubic yards of material. This testimony supports the Government's claim that the defendants schemed not to report the correct amount of fill that was to be placed on the property, thereby depriving the City of revenues from the licensing fees which would have been collected if the proper amount had been stated.

According to Fealy, Vulpis returned to the DOT in July 1988 and applied for a renewal of the street opening permit. The application for the renewal of the permit was made by Vulpis and Paccione and was signed by Vulpis. Fealy testified that the renewal was also issued to Paccione and Vulpis based on the application for the landfill and was subsequently sent to three other city agencies by mail, including the DOS. This is the mailing specifically alleged in the indictment in Racketeering Act 1c and Count 5.

Fealy also testified that Vulpis submitted an application for a street opening permit for a different area of land than that of the first permit in the beginning of August of 1988. Vulpis signed the application and the number of cubic yards of fill that would be placed on the property was again submitted with the application. The fee charged with the permit was based on the number of cubic yards indicated on the application.

On the basis of this application, the second street opening permit was approved and issued to Vulpis, Paccione and A&A Land Development. Fealy signed and gave this permit to Vulpis and again, following standard procedure, sent copies to the other city agencies, including the DOS, by mail. This is the mailing specifically alleged in the indictment in Racketeering Act 1d and Count 6. This mailing, along with the one alleged in Racketeering Act 1c and Count 5, is sufficient to show that the execution or attempted execution of the fraudulent scheme involved at least one use of the United States mails.

The evidence described above supports the inference that Paccione and Vulpis, acting on behalf of A&A and with the use of their companies, August, National, Stage, Rosedale, and Vulpis Brothers, participated in a scheme to misrepresent their intentions concerning the operation of the Arlington Yard landfill in order to deprive the City of licensing fees which would have been required for the operation they conducted.

The indictment also alleges a scheme to deprive the DOS of dumping fees. Allison Lewis-Smith, an employee at the DOS, whose responsibilities included issuing the letters of acknowledgement for clean fill grading operations, testified that she would issue a clean fill permit only after all the required documentation had been submitted and an inspection had been made of the site by an engineer to make sure that it complied with all regulations. According to Lewis-Smith, Paccione and Vulpis submitted an application to the DOS for a clean fill permit for the landfill. The application lists Kenneth Wilpon as the actual owner of the property of the proposed landfill operation and describes the kind of material that will be collected by the landfill as "demolition excavation material, used material, etc." and lists the source of the fill material as "excavation and highway material." The application is signed by Vulpis under a statement which says that he acknowledges his responsibilities for operating the proposed landfill in conformance with all regulations and that the statements contained in the application are all true. As indicated above, however, there is evidence that these statements made in the application were not true. According to Lewis-Smith, she relied upon these representations in issuing the permit to Vulpis and Paccione.

Lewis-Smith also testified that she reviewed a property owner's authorization form prior to issuing the landfill permit. The purpose of the authorization form is to show that the owner of the property has given permission to the contractor to perform the proposed grading operation. The authorization form that Vulpis and Paccione filed states that Wilpon, as owner of the property, gave Vulpis and Paccione permission to deposit clean fill there. As indicated above, however, there is evidence that the landfill was not operated on Wilpon's land alone but on CSX property as well. According to Lewis-Smith, without authorization from CSX, the owners of the property where the landfill was operated, she would not have issued the permit.

Lewis-Smith also reviewed the street opening permit from the DOT that Fealy issued to Paccione and Vulpis and that was sent to her by Fealy through the mail in deciding whether to issue a clean fill permit to Paccione and Vulpis for the landfill. This was the mailing specifically alleged in Racketeering Act 1c and Count 5 of the indictment.

The Government alleges that the defendants used these DOS and DOT permits as a cover for the illicit disposal of waste at the landfill through which the defendants defrauded the City of dumping fees to be derived from the lawful disposal of waste materials at the City-owned landfill at Fresh Kills. According to the Government, the DOS lost money because of the decline in the amount of dump tickets that were bought. This allegation is supported by the evidence introduced by the Government which shows that the purchase of DOS dump tickets by Rosedale and Vulpis Brothers declined from April through July of 1988 and the purchase of DOS dump tickets by National and August declined significantly from May through September of 1988.

In addition, John Raffa, a driver for defendants National and Stage, testified that he used to pick up garbage from clients and bring it back to the National and Stage transfer station. After that, the garbage would then be taken to the city owned Fresh Kills landfill. Raffa said this practice changed in the spring or summer of 1988 because the garbage was then brought to the landfill at the Arlington Yard. Raffa said that Paccione told him to go to the landfill and that he gave him directions on how to get there. Raffa also said that when he went to the landfill, he had to present a dump ticket at the entrance. There is further evidence which shows that other companies also brought their materials to the Arlington Yard landfill, depriving the City of additional dumping fees which would have been derived from the disposal of the waste at the City-owned facility at Fresh Kills.

According to the indictment, the schemes to defraud the City also involved a letter from defendant Paccione to Lewis-Smith, the mailing specifically alleged in Racketeering Act 1e and Count 7. An audiotape introduced into evidence by the Government of a conversation between Lewis-Smith and Paccione at a meeting in late August indicates the he promised to send her copies of the engineering reports of soil testing that were being done on the Arlington Yard site. Lewis-Smith testified that she had received a letter from Paccione through the mail enclosing copies of certain soil tests from the site. However, there is evidence that Paccione lied with regard to the testing. An employee from Hart Associates, who was to be coordinating the testing, was not at the site on a daily basis as Paccione had stated. In addition, Robert Ehlers, an employee of Hart Associates, testified that he never collected the samples himself and did not see from where some of the samples were taken. Ehlers also testified that defendant Weiss told him that the testing was being done for Pat Lomano of the DOS. Ehlers recommended to Weiss that samples should be collected from one out of every ten trucks at the site. However, during the entire time that Ehlers was a consultant for A&A Land Development, he only received ten samples. After receiving the samples, Ehlers sent them to the Accutest Labs for testing.

Vincent Pugliese, who is employed by Accutest, testified that Weiss never told him where the samples were coming from or what the samples were. Pugliese testified that between June and September of 1988, he received 23 samples in all from Weiss. Much of the information that Accutest used in its test results were taken from the information on the samples sent by Weiss which were never confirmed. Accutest also expressed concern to Weiss over the chain of custody that was occurring with the samples. However, according to Pugliese, Weiss did not comply with Accutest's requests to change this process.

In sum, the court finds that the evidence recited above is sufficient for a jury to infer beyond a reasonable doubt that the defendants Paccione, Vulpis and their affiliated partnership and corporations unlawfully, wilfully and knowingly engaged in a scheme to defraud the City of New York of money through revenues from licensing fees and dumping fees.

2. Racketeering Act 3d and 4a-i and Counts 8 and 9: Mail and Wire Fraud on CSX

The indictment charges that the defendants Paccione, Vulpis and their affiliated partnership and corporations engaged in a scheme to defraud CSX of money and property, specifically, to devalue CSX property by removing clean fill from the land and by dumping waste materials onto the site. According to the indictment, the defendants achieved this by making a series of false and fraudulent representations to CSX concerning the operation of a landfill on CSX property, which included statements that only clean fill was being deposited on the property and that it was all being deposited on Wilpon's property.

Joseph Langley, development manager for CSX Realty, testified that he first became involved with the property at the Arlington Yard when in late 1987 he undertook a study of the property to determine whether it could be used for residential purposes. Langley recommended that the property he rezoned for residential use and estimated that the property had a value of $20 million if it was to be rezoned. Langley then testified that the idea of placing clean fill on CSX's property arose in May 1988 when Wilpon suggested the idea to Thomas Dunck, another employee at CSX. Wilpon told Dunck that he was considering a proposal by the defendants to place clean fill on the property. Dunck wrote a memo to the other representatives at CSX, introduced into evidence, concerning the proposal and then wrote a letter to Wilpon on May 19, 1988, also introduced into evidence, which said that the proposal would be considered by CSX. However, the letter also said that there were some serious concerns about assuring that the end result of the proposal by the defendants would be the improvement of the value of the property. Dunck testified that by sending this letter he was not giving Wilpon approval to place fill material on the CSX property.

Dunck also testified that in early June there were still problems with the Wilpon proposal about which the CSX representatives were concerned and which had to be remedied before any agreement could be made. According to his testimony, on June 17, he wrote a memo to another employee at CSX, introduced into evidence by defendants, and confirmed that the removal of any contaminated soil was made a condition to any agreement and that this was the responsibility of the contractor [Paccione, Vulpis, and A&A] who would be filling the property. The memo stated that "the contractor is aware of this requirement and has agreed to it." This is evidenced by a hold-harmless letter sent by Paccione and Vulpis on behalf of A&A Land Development to Dunck at CSX, which is the mailing specifically alleged in the indictment in Racketeering Act 3d. Langley testified that the discussions continued in June and July of 1988 and that he was not aware of any filling procedures that were actually being conducted on CSX property at the time or that anyone else had given permission for any filling procedures to be conducted. Dunck also testified that in no time in July 1988 did he authorize Paccione, Vulpis, Weiss, Wilpon, or anyone else to place fill material on CSX property.

After a discussion with Dennis Rubin from Woodward-Clyde, in July, 1988, Langley spoke to Wilpon and Weiss and told them that waste material had been found on the site to which they responded that there was no such material on the property. However, as indicated above, there is evidence that waste material had been placed on the property by this time. In addition, Rubin testified that when he went to the landfill site with Langley, he observed construction activities in progress. After confronting Weiss about the purpose of these construction activities, Weiss told them that the construction was needed in order to dig out the unsuitable material on the property and replace it with other material in order to support the new residential complex which they said they had begun to build. However, there is evidence that the purpose of the construction activity that was occurring on the property was to further the use of the landfill as a dumping site. Rubin also testified that the material that naturally occurred on the property was suitable for construction and the defendants did not have to dig in order to stabilize the property, as Weiss had contended.

Langley also testified that on July 27, 1988, he went to visit the Arlington Yard site and saw what appeared to be a major construction or grading operation tasking place on the property of CSX. This is when the CSX representatives learned that large amounts of waste materials had been dumped on CSX property. Langley then had a meeting with Weiss, Paccione, and Vulpis in the construction trailer of A&A Land Development at which time he saw a constant stream of dump trucks entering the site at a rate of five to ten per hour. Langley also testified that he saw a mixture of garbage and construction debris coming out of the trucks and there was a very offensive smell in the area, like garbage. Weiss again told him that they were trying to improve the property and that all the activity occurring was for CSX's benefit. Langley and the other CSX representatives then told defendants Weiss, Paccione, and Vulpis that they had no authority to be conducting the operation on CSX property, that they did not have permits to be filling on CSX property and that they should stop all dumping. In telephone conversations between Weiss and Stephen Beck of CSX on July 27 and August 1, 1988, which are the calls specifically alleged in Racketeering Acts 4d and 4e and which are referred to in letters introduced into evidence, Beck reiterated the demands made at the meeting on July 27 and put the defendants on notice that any unauthorized entry onto the CSX land constituted grounds for legal action by CSX. In addition, Langley noticed that the permits that the defendants did possess applied to Wilpon's property and that the plans he viewed were for industrial development, not residential development as CSX had previously planned.

Langley then testified that after viewing the site, he told Rubin to begin immediate surveillance of the property to see if the filling continued after the defendants had been told to stop. Rubin returned to the site on August 1 and met with Vulpis. He testified that the excavation of the pits was still occurring and that trucks were arriving once every five to eight minutes. Rubin also said that this activity was definitely taking place on CSX property, west of the place where Weiss said the border between the CSX and the A&A Land Development property existed. Langley then wrote a memo, introduced into evidence, to Brian Gabriel of CSX on August 3, 1988 and said that Rubin told him that the unauthorized filling and grading was continuing on the property. Langley then called Weiss to repeat the demands to vacate the CSX property immediately. Weiss told him not to be concerned. This is the telephone call specifically alleged in the indictment in Racketeering Act 4f. On the same day, Langley wrote another memo to Gabriel, also introduced into evidence, and said that Weiss called him to tell him they received a permit for filling and grading the CSX property. Weiss also said that the Hart testing identified high levels of asbestos on the CSX property and the asbestos was not the result of the unauthorized filling activities. Weiss also said on the same day that the asbestos levels on the property were not high enough to cause concern. This telephone call is the one specifically alleged in Racketeering Act 4g of the indictment. With respect to the testing, Weiss also told Dunck that testing was being done on a daily basis, that test samples were being taken from each load as it came in, and that the samples were being forwarded to Hart and then to Accutest. According to Ehlers and Pugliese, these statements were not correct.

Langley also testified that on August 4, 1988, he, Gabriel, and Rubin met with Paccione, Vulpis, and Weiss. Gabriel again told them that they had no authority to conduct the filling operation on CSX property and said that they should stop immediately. Vulpis, like Weiss previously, told Langley at the meeting that they were doing them a favor by continuing the activity and that they were looking after CSX's interests. Meanwhile, at the same time, the defendants were continuing to operate a landfill on the property. Rubin testified that he observed trucks dumping at the site and that he smelled a garbage ordor coming from the pits.

According to Langley, he and Gabriel had an attorney for CSX draft three letters concerning the actions which should be taken to stop the activity from continuing on the CSX property. One of these letters, the mailing specifically alleged in Racketeering Act 4b and Count 9, was directed to Wilpon and Weiss and spoke of the illegal and unauthorized landfill operation and again instructed them to vacate the property. Another letter, the mailing specifically alleged in Racketeering Act 4a and Count 8, was directed to Paccione and

Vulpis at A&A Land Development and stated that the excavations and landfill operations were unauthorized and illegal and directed them to stop immediately. It also stated that they were not even allowed on the property. Vulpis responded to the letters that were sent by CSX representatives concerning the landfill in a letter to Gabriel, the mailing specifically alleged in the indictment in Racketeering Act 4c, and said that they made commitments to have the material on the property removed beginning on August 22. However, there is substantial evidence that the dumping continued at the landfill subsequent to this date.

On August 8, 1988, there was a meeting of CSX representatives in regards to the landfill site. During a conference call with Weiss and Wilpon, which is Racketeering Act 4i, Dunck told them that notwithstanding their earlier assurances, activity was occurring at the CSX property, without the authorization of CSX and that they demanded that they stop immediately. Dunck summarized the points discussed in this conversation in an internal CSX memo, introduced into evidence by Defendants, which also make reference to the telephone call alleged in the indictment in Racketeering Act 4h.

Langley and Dunck returned to the property with Gabriel and Beck on August 18 and met with Paccione, Vulpis, Weiss, and Ehlers from Hart Environmental. Weiss told them at the meeting that the material placed on the site was clean fill and that it was the custom in New York that a percentage, usually 5-10% of the material placed on the site, could have things such as wood or other organic types of material in it and still be called clean fill. Meanwhile, Langley testified that he observed that the mound that was on CSX property had continued to increase in size and that the dumping operation had been continuing unabated. CSX also obtained a temporary restraining order issued by the court on August 19, 1988 to keep Wilpon, Weiss, Vulpis, Paccione and A&A from entering the property and performing any activity on the property. There is evidence, however, that this retraining order was not adhered to by the defendants.

From the evidence recited above, the court finds that there is sufficient evidence to infer that the defendants Paccione, Vulpis and their affiliated partnership and corporations unlawfully, wilfully and knowingly engaged in a scheme to defraud CSX of money and property, specifically to devalue CSX property by removing clean fill from the land and by dumping waste materials onto the site.

3. Racketeering Act 12: Mail Fraud on State Government Agency

The indictment charges that defendants Paccione, Vulpis, McDonald and their affiliated corporation New York Environmental Contractors ("NYEC") engaged in a scheme to defraud the State of New York of property in the awarding of a waste transporter permit to NYEC. It is alleged that the defendants achieved this by making false and fraudulent representations directly to the New York State Department of Environmental Conservation ("DEC") in order to obtain the permit to transport infectious medical waste. These statements included that McDonald was 100% owner of NYEC and that the New Hanover incinerator in Pennsylvania had granted permission to NYEC to deliver infectious waste to their facility.

Rocky Piaggone, of the Division of Environmental Enforcement of the DEC, testified that in order for a private carting company to transport medical waste, the company had to obtain a Part 364 permit from the DEC. Piaggone testified that the private carting company had to obtain prior permission of a waste disposal facility to bring waste there in order to receive a Part 364 permit and that the waste had to be disposed of at the facility specified on the permit. Part C of the application provided this information along with the type of waste to be transported.

Norman Drapeau, supervisor of the waste transporter permit section of the

DEC, testified that his office received Part C of a waste transporter permit application from defendant McDonald on behalf of NYEC on February 26, 1988. This is the mailing specifically alleged in Racketeering Act 12a. The application lists the New Hanover incinerator as the treatment, storage or disposal facility and states that they are located in "Permieonville," Pennsylvania. It also lists Stephan "Stezento" as the contact person at the facility and contains the signature of "Stephan Stezento" with his name printed alongside. However, Stephan Stezenko testified that he never heard of a company called New York Environmental Contractors. Stezenko also testified that he did not recognize any of the handwriting on Part C of the application and said that he had never seen the document prior to discussions concerning the case. He said that the document does not contain his signature and that his name, as well as the town where the New Hanover incinerator is located, Permieonville, were misspelled. Finally, Stezenko testified that the New Hanover incinerator never received infectious medical waste from NYEC.

Gus Lesnevich, a handwriting expert, testified that after performing an analysis of the handwritings on Part C of the waste transporter permit application and handwriting specimens of McDonald, he concluded that the signature of Stephan Stezenko was probably written by McDonald. Lesnevich also stated that the handprinted text on the application also was written by McDonald.

According to Drapeau, in response to the application containing the statements regarding the New Hanover incinerator, the DEC issued a waste transporter permit to NYEC on March 31, 1988, authorizing them to dispose of the medical infectious waste at the New Hanover incinerator. This is the mailing specifically alleged in Racketeering Act 12b.

Drapeau also testified that the DEC received an amended waste transporter permit application dated October 19, 1988 from McDonald on behalf of NYEC, the mailing specifically alleged in Racketeering Act 12c. At that time, there were additional sections on all waste transporter permit applications, Parts D and E, which provided background information on all applicants. Part D was signed solely by McDonald and indicates that he was the 100% owner of NYEC. However, there is evidence that

McDonald was not the sole owner of NYEC but that Paccione, Vulpis and McDonald each possessed a 1/3 interest in the company. This is illustrated by a waste transporter permit application submitted to the DEC by New York Environmental in March 1989. In that application, Paccione, Vulpis and McDonald each are listed as having a 1/3 interest in the company, with the interest dating back to August 15, 1988. This is prior to the date of the application submitted by NYEC on October 19, 1988, where it is stated that McDonald owns a 100% interest. This application is also signed by Paccione, Vulpis and McDonald, unlike the prior application which is only signed by McDonald. According to Drapeau, in response to the amended application with these statements, the DEC issued the amended waste transporter permit on October 21, 1988.

The court finds from the evidence recited above that there is sufficient evidence that the defendants Paccione, Vulpis, McDonald and their affiliated corporation New York Environmental Contractors unlawfully, wilfully and knowingly engaged in a scheme to defraud the State of New York of property by depriving the DEC of control over the process of awarding a waste transporter permit to NYEC.

4. Racketeering Act 13-17 and Count 12: Fraud on Doctors and Medical Care Facilities By New York Environmental

The indictment charges that the defendants Paccione, Vulpis, McDonald and their affiliated corporation, NYEC, engaged in a scheme to defraud doctors and hospitals which generated medical and infectious waste materials of money and property. The Government contends that the defendants accomplished this by charging the generators the rates required for the lawful transfer, storage and disposal of this waste which was higher than the rates actually incurred by transferring, storing and disposing of the waste illegally. The Government also contends that the defendants exposed the generators to potential civil and criminal penalties for the illegal transfer, storage and disposal of such waste.

Rocky Piaggone testified that the penalties for the unlawful transportation of infectious waste were not distinguishable among the transporter, the disposer or the generator. Regardless of the intent of the person involved, they could be held responsible. If a generator turned over its waste to a transporter whom they thought was permitted but actually was not, they violated the law.

As stated previously in this Opinion, there is evidence indicating that NYEC possessed a Part 364 permit from the DEC to transport infectious medical waste which required NYEC to dispose of the waste at the New Hanover incinerator in Pennsylvania. Dr. Lloyd Cryprys, Dr. Annamma Vinograd, Dr. Ramon Vado, Joanne Adelfio from Long Island College Hospital and Marjorie Sitro from the Brooklyn Kidney Center all testified that NYEC transported their infectious medical waste. However, the testimony discussed above of Stephan Stezenko of the New Hanover incinerator, indicates that none of the waste was ever disposed of at that facility. In addition, according to the manifests that were given to these generators, a South Carolina site was to be the designated waste disposal facility for the generators' medical waste. However, there is evidence that most of the waste that was picked up from these generators did not go to the South Carolina facility either. By not transporting the waste to the facility they were required to by the DEC permit, the defendants exposed the generators to potential civil and criminal penalties.

The Government also contends that NYEC illegally stored and transferred infectious waste in unlicensed vehicles and at unlicensed facilities. Jim Milewski, an environmental conservation officer at the DEC, testified that on September 16, 1988, he went to the National and Stage transfer station to examine a tractor trailer parked outside the facility. The trailer had the word Rosedale written on its side with DEC permit number 2A187, which was the waste transporter permit issued to NYEC. Milewski testified that he observed blood dripping from the trailer onto the pavement, which constituted a DEC violation for failing to contain the waste. When the trailer was eventually opened for inspection, boxes marked medical waste were observed. Milewski testified that the trailer was not permitted to haul infectious medical waste and that the trailer should have been labeled "infectious" on the side, which was also a violation of DEC rules. Milewski identified the medical waste on the trailer to include waste from Long Island College Hospital and the Brooklyn Kidney Center, further evidence that the medical waste that was picked up from these generators was not brought to the South Carolina site as stated on the manifests they were given.

The generators also testified that they received letters and invoices from NYEC through the mail. These are the mailings specifically alleged in the indictment in Racketeering Acts 13-17 and Count 12. The Government argues that the defendants used these mailings for the purpose of executing the scheme to defraud the generators. The generators testified that they received bills in the mail from NYEC for their services and that they paid for the lawful transfer, storage and disposal of their medical waste. However, the evidence supports the inference that this is not the service they received.

One of these mailings, an advertisement sent by NYEC to potential customers, asserts that NYEC is licensed by New York State and permitted to handle generators' medical waste needs and that in order to avoid being prosecuted for the illegal dumping of their medical waste, generators should use NYEC as their waste transporter. Another promotional letter states that NYEC will transport the generator's medical waste to the licensed incinerator facility by their vehicles which have been specifically approved for infectious waste by the DOT. The letter also states that the medical waste will be incinerated within 24 hours of pickup. As seen from prior testimony, however, the evidence supports the inference that these assertions on the part of NYEC were not true. At the same time, the advertisements support the inference that the generators discussed above paid NYEC to dispose of their waste lawfully, precisely because they were concerned about potential liability to themselves if their waste were unlawfully disposed of.

The court finds from the evidence recited above that there is sufficient evidence that the defendants Paccione, Vulpis, McDonald and their affiliated corporation, NYEC, unlawfully, wilfully and knowingly engaged in a scheme to defraud doctors and hospitals which generated medical and infectious waste materials of money and property by charging prices for services which were not provided and by exposing the generators to potential civil and criminal penalties.

Relationship Plus Continuity

Having set forth the evidence with respect to the racketeering acts charged in the indictment, evidence of a pattern of racketeering activity is demonstrated by the fact that at least two of the racketeering acts allegedly committed by each defendant were related by common participants, victims, methods, purposes or results and that they amount to or demonstrate a threat of continued racketeering activity. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. __, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); see also United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc), cert. denied, __ U.S. __, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989). The existence of such a threat is shown by evidence that the related predicate acts themselves involve a distinct threat of long term racketeering activity. The threat of continuity can also be established by showing that the racketeering acts can be attributed to a defendant operating as part of a long term association that exists for criminal purposes or where the racketeering acts are a regular way of conducting or participating in an ongoing and legitimate RICO enterprise. H.J., 109 S.Ct. at 2902, 106 L.Ed.2d at 209-10. In the instant case, both the relatedness of the racketeering acts alleged and the threat of the landfill which was closed down by the Government and the waste disposal operation which allegedly continued at least until the date of the instant indictment. Since at least two of the racketeering acts allegedly committed by each defendant illustrate relatedness plus a threat of continued racketeering activity, these acts constitute a pattern within the meaning of the RICO statute. Indelicato, 865 F.2d at 1383.

d. Participation in the Enterprise through a Pattern of Racketeering Activity

The fifth and final element of a RICO offense which the Government must prove beyond a reasonable doubt is that a defendant conducted or participated in the conduct of the enterprise's affairs through the pattern of racketeering activity previously discussed.

The facts recited above are adequate to establish that each defendant engaged in a pattern of racketeering activity and that the defendant's employment by or association with the enterprise facilitated or influenced his commission of the racketeering acts. The facts are also sufficient to show that the racketeering acts had some or were intended to have some impact or effect in furtherance of the affairs of the enterprise -- the enrichment of the individual defendants and their affiliated partnership and corporations through the operation of an illegal landfill and the disposal of waste materials in violation of federal, state and local law. Since the evidence shows that each defendant's employment by or association with the enterprise facilitated or influenced their commission of the racketeering acts, and since those racketeering acts were intended to have and did have some impact or effect on the enterprise, the Government has sufficiently demonstrated the requirements of this element of the RICO offense.

II. COUNT II -- RICO CONSPIRACY

Count Two charges each defendant with unlawfully, wilfully and knowingly conspiring to conduct and participate, directly and indirectly, in the affairs of a racketeering enterprise through a pattern of racketeering activity including mail and wire fraud in violation of 18 U.S.C. Sec. 1962(d).

In this case, the evidence for an agreement on the defendant's part to violate Sec. 1962(c), the substantive RICO offense, is the evidence that they committed at least two of the racketeering acts with which they are charged. As the court found above, the Government has introduced sufficient evidence upon which a reasonable jury could find each defendant's guilt beyond a reasonable doubt as to the counts charged in the indictment. In view of this finding there is evidence sufficient to show that the defendants agreed to commit at least two racketeering acts and participate in the affairs of a racketeering enterprise through a pattern of racketeering activity.

III. CONCLUSION

On the basis of the evidence presented by the Government in its direct case and recited in this Opinion, the court finds that the defendants Paccione, Vulpis, Weiss, McDonald and their affiliated partnership and corporations unlawfully, wilfully and knowingly became members of and participated in the RICO conspiracy charged in Count Two of the indictment. Accordingly, pursuant to United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970), co-conspirator declarations made in furtherance of the conspiracy may be considered by the jury against each defendant with respect to the conspiracy charged.

As to the defendant's motions for a judgement of acquittal on all counts pursuant to Fed. R. Crim. P. 29, the evidence presented by the Government in its direct case and recited in this opinion is sufficient to withstand those motions.

Dated: August 13, 1990
New York, New York

CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX D

Opinion of the United States District Court for the Southern District of New York (751 F. Supp. 368) Oct. 12, 1990

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. SSS 89 Cr. 446 (CBM)

Oct. 12, 1990

UNITED STATES OF AMERICA,

v.

ANGELO PACCIONE, ANTHONY VULPIS, and
JOHN MCDONALD,

AMENDED MEMORANDUM OPINION REGARDING SENTENCING

MOTLEY, *District Judge.*

BACKGROUND

Defendant McDonald was convicted after trial by jury of one count of mail fraud. The maximum statutory penalty for mail fraud is five years in prison and a fine up to $250,000 and a special assessment of $50. Title 18 U.S.C. § 1341; Title 18 U.S.C. § 3013; Title 18 U.S.C. § 3571. *See* Appendix A.

Defendant Paccione was also convicted by the same jury of a substantive RICO charge and a charge of conspiracy to violate RICO. Title 18 U.S.C. § 1963(c) and (d). The maximum statutory penalty for each of these charges is twenty years in prison for a total of forty years, forfeiture of two times all gains from the racketeering activity involved, or fines up to

$250,000 for each count. Title 18 U.S.C. § 1963(a); Title 18 U.S.C. § 3571. All of the predicate acts which supported the two RICO counts were federal mail fraud offenses. In addition, Paccione was convicted of six related substantive Mail Fraud counts each of which carries the maximum penalty of five years for a total of thirty years and a fine of $250,000 as to each count for a total of $1,500,000. Title 18 U.S.C. § 1341. *See* Appendix A.

Defendant Vulpis was similarly convicted of a substantive RICO and a RICO conspiracy count with respect to which the maximum statutory penalties and forfeitures provisions are the same as for Paccione. Vulpis, in addition, was convicted of five related substantive Mail Fraud counts, each of which carries a maximum prison term of five years for a total of twenty-five years and a fine up to $250,000 for a total of $1,250,000. A special assessment of $50 is also required for each conviction for a total of $400 in the case of Paccione and a total of $350 in the case of Vulpis. *See* Appendix A.

Defendants are now before the court for sentence. Since the criminal activity here involved all took place after October 1, 1987, the statutory Sentencing Guidelines promulgated by the United States Sentencing Commission, and which became effective as a result of Congressional action on October 1, 1987, must be utilized in this case. Because this case involves both a mega-fraud and substantial environmental damage, application of the Guidelines has proved challenging, especially since case law guidance is still scarce.

Defendants Paccione and Vulpis, as noted, have been convicted of one of the largest and most serious frauds involving environmental crimes ever prosecuted in the United States. The amount of damage with respect to monetary loss resulting from the fraud is literally off the Sentencing Guidelines' charts and is in the tens of millions of dollars. The Guidelines contemplate fraud involving amounts up to $5,000,000. However, a conservative estimate of the fraud here is $35,000,000.

The convictions stem, in essence, from defendants' operation of an illegal landfill on Staten Island, a part of New York City, and the illegal disposal of thousands of tons of garbage and hazardous waste in violation of state and local law.

The evidence in this case disclosed that the private waste disposal industry is now highly regulated because of the critical need to protect the public health; as such permits and licenses must be obtained from various state and city agencies. These licenses and permits are issued based upon applications submitted by individuals and corporations and require information such as: the specific type of activity to be engaged in by the applicant, the location of the activity, and the identity of individuals.[1] Private waste carters must dispose of garbage at the City owned landfill at Fresh Kills and in order to do so they must pay a dumping fee.

Vulpis and Paccione used their permits and licenses as a cover to engage in the illegal collection, transportation and disposal of waste in violation of those licenses and permits and the laws applicable to them. In order to receive these licenses and permits, Vulpis and Paccione intentionally made false statements to City agencies claiming, among other things, that they intended to operate a clean fill grading operation on certain land in Staten Island. Instead of operating a clean fill grading operation, however, defendants dumped thousands of tons of garbage, some of which contained asbestos, on land in Staten Island near a residential area.

Vulpis' and Paccione's illegal scheme to dispose of waste developed when, in 1988, the City decided to raise its rates for the legal disposal of waste at the City owned landfill, at Fresh Kills on Staten Island, from $9 a ton to $18 a ton. Thus, by the scheme which Paccione and Vulpis perpetrated, they defrauded the City of New York of both licenses and dumping fees. Such dumping fees would have been derived from the lawful disposal of waste material at the City owned landfill.

Defendants were also found guilty of defrauding CSX of both land and money. This was accomplished by removing clean fill from land owned by CSX, without the authorization of CSX, and replacing it with waste materials. Defendants accomplished this by making false statements to CSX, including statements that only clean fill was being deposited on its property in Staten Island. Eventually CSX obtained a restraining order from a New York state court to prevent the continued dumping. Paccione and Vulpis, however, as the evidence disclosed, violated this order and continued dumping garbage on CSX land.

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[1] Corporations owned by defendants were also convicted of the same crimes.

Paccione and codefendant McDonald[2] were convicted of mail fraud stemming from fraudulent statements given to the New York State Department of Environmental Conservation in order to obtain a permit to transport medical waste. These false statements included that McDonald was a 100% owner of defendant New York Environmental Contractors (NYEC) a New York Corporation and that a Pennsylvania incinerator had granted permission to deliver medical waste to its facility. Paccione and McDonald also defrauded doctors and hospitals by charging these waste generators the rates required for the lawful transfer, storage and disposal of waste which was higher than the rates actually incurred by the illegal disposal of such waste. By disposing of the medical waste illegally, defendants exposed the waste generators to both civil and criminal liability, although defendants had assured such generators that they were duly licensed.

I. JOHN McDONALD

McDonald was convicted of one count of mail fraud with respect to his role in the operation of NYEC. The mail fraud stemmed from McDonald's having made false statements on a Department of Environmental Conservation permit applicaton. The permit allowed NYEC to transport infectious medical waste. Specifically, the false statement involved McDonald statements that he was 100% owner of NYEC and that NYEC had obtained permission to dispose of the waste at a specific incinerator in Pennsylvania. Both of the above statements were false. In addition, McDonald defrauded numerous medical waste generators by charging them the rates required for lawful disposal and transfer of such waste while disposing of such waste illegally and at far lower fees.

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[2] McDonald was not found guilty of RICO or RICO conspiracy by the jury. However, the jury did find McDonald guilty of the fraudulent acts under the RICO count. Mr. McDonald was convicted of one count of mail fraud in regard to Dr. Vado.

The fraud which McDonald perpetrated caused the loss of \$20,000-\$50,000. This figure is derived from the fees that the clients of New York Environmental Contractors paid. The receipts from such fees are between \$20,000-\$50,000. Under § 2F1.1 of the Federal Sentencing Guidelines, McDonald receives a base level of six for the fraud. An additional four levels must be added under § 2F1.1(b)(1)(E) because of the dollar amount of the loss (\$20,000-\$50,000) which was caused by the fraud. This brings McDonald's total level to ten.

Under § 2F1.1(b)(2), an additional two levels must be added if the offense involved more than minimal planning or a scheme to involve more than one victim. These two points are necessary to capture the seriousness of McDonald's conduct. The basic mail fraud offense does not factor into it either the number of victims of the fraud or the extent to which the fraud had previously been planned.

Defense argues that mail fraud, by its very nature, involves more than minimal planning and victimizes more than one person. But the commentary to § 2F1.1 provides that "more than minimal planning means more planning than is typical for commission of the offense in simple form." Section 2F1.1(b)(2) allows a judge to differentiate between mail fraud in its simple form and a complex mail fraud scheme. The court finds that McDonald did not engage in a simple mail fraud scheme but rather engaged in a complex scheme which involved forging a document to obtain a permit and sending out letters to solicit business to hundreds of waste generators. In addition, there was more than one victim of McDonald's fraud because NYEC had numerous clients. The jury found McDonald guilty of defrauding Long Island College Hospital, Brooklyn Kidney Center, Dr. Cyprys, Dr. Vinograd and Dr. Vado. These waste generators were defrauded into believing that their waste was being disposed of in accordance with applicable state and city laws.

This court has chosen to subtract two points under § 3E1.1(a) because McDonald has accepted responsibility for his acts. McDonald's acceptance of responsibility is demonstrated by his cooperation with the Federal Bureau of Investigation. Furthermore, McDonald's choice to stand trial was not a denial of his responsibility but rather a challenge to the applicability of the RICO and RICO Conspiracy charges of which he was acquitted.

Finally, this court will not depart downward because of McDonald's "special circumstances." A departure downward due to such circumstances as family ties and relationships is within the discretion of the sentencing court. *United States v. Sharpsteen*, 913 F.2d 59, 63-64 (2d Cir.1990); *See also United States v. Lara*, 905 F.2d 599 (2d Cir.1990); *United States v. Paulino*, 873 F.2d 23, 25 (2d Cir.1989). Although the court recognizes that it has the power to depart downward, the court finds that McDonald's circumstances do not warrant such a downward departure. The court has no doubt that McDonald is an excellent father and husband but McDonald also stands convicted of a serious offense.

McDonald has a total level of ten which corresponds to a sentence of six-twelve months. The court has chosen to sentence McDonald to twelve months because of the nature of the crime as described above, particularly the fact that a public agency was defrauded and the public's health was threatened. In addition, under § 5D3.2, this court will impose a period of two years supervised release. McDonald is to abide by the standard conditions determined by the Sentencing Commission and shall not engage in the private waste carting business during that period of supervision. Finally this court is imposing a $250,000 fine on McDonald and a $50 assessment for his conviction for one count of mail fraud. 18 U.S.C. § 3571; 18 U.S.C. § 3013. The court finds and concludes that McDonald has not made full disclosure of his income and assets. He also has not made full disclosure of his liabilities. Particularly suspicious is an alleged repayment of a large loan to McDonald's father-in-law. However, based upon the income of McDonald and his wife from two businesses which they sold to defendant Paccione's wife in 1987 and other income received by them since 1988, amounting to over $1,000,000 and the future income from the sale of such businesses, the fine is not unreasonable.

II. ANTHONY VULPIS AND ANGELO PACCIONE

A. RICO and RICO Conspiracy

Defendants were convicted of RICO and RICO conspiracy and as such § 2E1.1 of the Federal Sentencing Guidelines applies. That section states that the base offense level for RICO is nineteen or the offense level applicable to the underlying racketeering activity. It instructs that the higher level is to be used. Application note 1 of § 2E1.1 directs that the adjustments in Chapter 3, Parts A, B, C and D (victim-related adjustments, adjustments for roles in the offense, obstruction of justice, and the multiple count rules) be applied for each underlying offense.

Under § 2E1.1 Paccione and Vulpis each receive a level of nineteen for the RICO offense. Four additional levels are then added under § 3B1.1(a) because defendants were both organizers and leaders "of a criminal activity that involved five or more participants or was otherwise extensive". *See infra* p. 375 (discussion of § 3B1.1). Thus defendants' total level under RICO is 23.

B. Fraud

Fraud is the underlying RICO activity in which Paccione and Vulpis engaged. As previously stated fraud is governed by § 2F1.1 and provides for a base level of six. However, the amount of the fraud which Vulpis and Paccione perpetrated is tremendous. They defrauded the City by making false statements on applications which in turn deprived the City of millions of dollars in both licensing and dumping fees.

Defendants also defrauded CSX by dumping waste containing asbestos upon its land and destroying any value that the land possessed. This damage also runs in the millions of dollars as will the cost of cleanup. According to the Guidelines the seriousness of a fraud offense is calculated by the loss that the victim suffers. Section 2F1.1 directs the reader to look at § 2B1.1 for a definition of loss. Section 2B1.1 states that:

> "loss" means the value of the property taken damaged or destroyed. Ordinarily when property is taken or destroyed the loss is the fair market value of the particular property in issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.

In this case, defendants' fraudulent activity caused loss in the amount of approximately $34,250,000 ($9,000,000 loss to the city in dumping fees, $10,000,000 loss to CSX, and $15 million cost of clean-up).[3]

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[3] The Government's evidence showed the cost of cleanup to be between $15 and $30 million. The parties dispute the amount of loss resulting from the fraud. The Government contends that the loss is $34,250,000. Their breakdown is as follows: actual loss of fees for dumping to the City of New York = $9,250,000, destruction of the value of CSX's land = $10,000,000, cost of cleanup = $15,000,000. The Government calculated the lost fees to the City using the following formula: the City charge of $18.50 per cubic yard × 500,000 cubic yards of garbage that was illegally dumped.

The probation department found in the presentencing report that the defendants caused a loss of $19,250,000. This number was derived from the loss of fees to the City and the loss of value to CSX land. The probation department did not count the $15,000,000 cost of clean-up. Defendants argue that the Government's figure is distorted because the $15,000,000 is counted in determining the sentence level under the environmental offenses and thus to count it under the fraud offense as well is duplicative. A second objection involves the amount of cubic yards of garbage which was actually brought to the dump. Defendants claim that it was 139,000 cubic yards. Finally the defendants argue that the $10,000,000 loss to the land should not be counted because the land will be cleaned-up for $15,000,000 and as such there is no

Because the dollar amount of the loss was at least $5 million, § 2F1.1(b)(1)(L) requires this court to add an additional eleven levels to the basic fraud offense level of six. This brings each defendant's sentence level up to seventeen points.

C. Nature of the Fraud

In addition, § 2F1.1(b)(2) requires that there be an increase of two levels if "the offense involved (A) more than minimal planning, (B) a scheme to defraud more than one victim; . . . or (D) violation of any judicial or administrative order, injunction, decree or process."

In this case both Vulpis and Paccione were involved in a highly complex scheme that was well thought out and that required an inordinate amount of planning in fraudulently obtaining permits and directing an operation that resulted in the illegal dumping of thousands of tons of garbage. There were also numerous victims of defendants' fraud including: the Department of Transportation, the Department of Sanitation and CSX. In addition, Paccione was found to have defrauded the Department of Environmental Conservation, the Brooklyn Kidney Center, Dr. Cyprys, Dr. Vinograd, Long Island College Hospital, and Dr. Vado.

Moreover, Paccione and Vulpis continued to illegally dump waste on CSX land despite a restraining order prohibiting them from doing so. The court concludes that defendants' actions were in direct violation of an injunction. Under § 2F1.1(b)(2), the court must add two levels which brings Vulpis' and Paccione's level to nineteen.

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loss to the land. The defendants arrive at the figure of $7,000,000 as representing the loss caused by the fraud.

Since the sentencing charts for fraud only go up to $5 million dollars, it is not necessary for this court to make a precise finding involving the exact amount of the loss which resulted from the fraud.

D. Role in the Offense

Part B of the Guidelines provides an adjustment to the offense level based upon the role the defendant played in committing the offense. Section 3B1.1 provides an increase of four levels if the defendant "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." The court finds that both Vulpis and Paccione led and organized the fraudulent schemes which were perpetrated and both men greatly profited from their extensive criminal activity. Paccione and Vulpis personally interacted with City agencies to fraudulently obtain the permits that granted them permission to conduct a clean fill grading operation. Instead, defendants used the landfill operation as the site for extensive illegal dumping. Paccione also assisted Vulpis in overseeing the operation of the dump and Paccione and his companies brought construction and demolition debris to the dump sometimes at the rate of eight trucks per hour. Vulpis directed truck drivers as to where to dump their loads. Because Vulpis and Paccione were leaders and organizers, the court is adding four additional levels. The present total for Vulpis and Paccione, under the fraud offense, is 23.

E. Environmental Harm

Application note 15 to § 2F1.1 states, "[T]he mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses. For example, a state law arson where a fraudulent insurance claim was mailed might be prosecuted as mail fraud. In such cases the most analogous guidelines (in the above case, § 2K1.4) is to be applied." Thus the Guidelines direct a sentencing court to look at an underlying substantive offense when the fraud statutes are used to provide jurisdiction.[4]

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[4] This court could have chosen not to look at the environmental offenses at all but rather to sentence the defendants pursuant only to the

Vulpis and Paccione through their illegal dumping of waste on Staten Island caused serious environmental harm. The land which CSX owned was devalued by at least ten million dollars. The cost of clean-up will be at least fifteen million dollars (and could go as high as $30 million) and the actual harm that was done to the environment by such wide-spread dumping of garbage, some of which contained asbestos, cannot be calculated. Thus in this case, the most analogous Guideline offense is § 2Q1.2. This section provides for offenses involving the mishandling of hazardous or toxic substances or pesticides and provides for a base level of eight.[5] Because Vulpis and Paccione engaged in the illegal dumping of substantial amounts of asbestos which is a hazardous, carcinogenic material the court finds that § 2Q1.2 is applicable. As such Paccione and Vulpis have a base level of eight for the environmental offenses.

Under § 2Q1.2(b)(1)(A) an additional six points must be added "[i]f the offense resulted in an ongoing, continuous or repetitive discharge, release or emission of a hazardous or toxic substance or pesticide into the environment." The court finds that Vulpis' and Paccione's continuous illegal use of the landfill to dispose of asbestos meets this requirement and the

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fraud offense. If that had been the case, this court would have had to substantially depart upward to capture the harm which defendants caused to both the CSX land and the environment. In deciding how many levels to depart upward, this court would have looked to the environmental offense guidelines as a template. Thus the defendants would have had the same offense level whether this court uses application note 15 and looks at the environmental offenses or whether this court used its discretionary powers under § 5K2.0 or § 5K2.5. This court recognizes the recent warnings of the Second Circuit in *United States v. Barone*, 913 F.2d 46 (2d Cir. 1990) and *United States v. McCall*, 915 F.2d 811 (2d Cir. 1990) that a court cannot sentence a defendant for uncharged and unrelated conduct. However, in this case, there was a very strong nexus between the fraud and the environmental damage and such damage was found to exist by a preponderance of the evidence. In addition this court is using application note 15 and not departing upward in taking account of the environmental damage.

[5] Application note 3 states that "this section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation."

court is adding an additional six levels. Thus Vulpis' and Paccione's total level for the environmental offenses is presently fourteen.

Section 2Q1.2(b)(3) states that an additional four levels are to be added "if a cleanup required a substantial expenditure." In this case it will cost at least $15,000,000 to cleanup the land. Under any analysis, this is a substantial sum of money. Therefore four levels must be added to Vulpis' and Paccione's sentence. This brings the total to eighteen.

Section 2Q1.2(b)(4) requires that four levels be added "[i]f the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Indeed, this is precisely what has happened in this case. Paccione and Vulpis did not have permits to conduct the type of waste disposal operation in which they engaged. The permits which they possessed allowed them only to conduct a clean fill grading operation. Their disposal of waste violated this permit. As such four levels must be added. This brings the total level to twenty-two.

Finally, as discussed above, Vulpis and Paccione played leadership roles in the dumping of illegal and toxic substances. Section 3B1.1 requires that four additional levels be added. This brings defendants' total level for the environmental offenses to twenty-six.[6]

F. Acceptance of Responsibility

Section 3E1.1(a) of the Sentencing Guidelines provides for a two point reduction in the offense level if the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct. Of course the Guidelines do not require that a defendant accept responsibility for other than those offenses to which he has pled guilty or of which he has been found guilty. *United States v. Santiago*, 906 F.2d 867 (2d Cir. 1990); *United States v. Oliveras*, 905 F.2d 623 (2d Cir. 1990). In this case, however, neither Vulpis nor Paccione have adequately shown that they have taken responsibility for their acts nor do they show any remorse or contrition. *United States v. Tillem*, 906 F.2d 814, 828 (2d Cir. 1990) (defendant showed no contrition at sentencing following verdict); *United States v. Parker*, 903 F.2d 91, 106 (2d Cir. 1990) ("[W]e see no violation of due process in the Guidelines' provision for lenience for a defendant who has taken the desired step toward rehabilitation, or in the denial of lenience for one who has not.").

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[6] This court has the authority to add these four points under § 2E1.1 (governing RICO offenses). Application note 1 specifically allows adjustments for defendants' role in the offense. The RICO guideline is applicable because the environmental offense came under the rubric of the fraud offense which in turn came under the rubric of the RICO offense.

Alternatively, it could be argued that the environmental offense was itself part of the underlying RICO activity and therefore application note 1 is directly applicable.

This court is not punishing Vulpis and Paccione for going to trial. Rather the court is refusing to award defendants the reduction because the sole evidence that defendants submit to show acceptance of their responsibility are letters written after trial. In Paccione's letter he admits "his involvement in certain criminal activities." The document is written in the third person, referring to Paccione as "he". Moreover it is unsigned. The document also does not discuss or acknowledge the racketeering convictions. *See United States v. Ramirez*, 910 F.2d 1069 (2d Cir. 1990) (reduction denied because defendant did not take responsibility for full scope of charged offense and took evasive actions). Similarly, Vulpis' statement comes from counsel and much of its wording is identical to that of Paccione's. Once again, Vulpis' statement is unsigned and does not fully admit his responsibility for the crimes of which he was convicted. *See United States v. Moskowitz*, 883 F.2d 1142, 1155 (2d Cir.), *aff'd, in part, vacated and remanded in part*, *United States v. Moskowitz*, 888 F.2d 223 (2d Cir. 1989) (defendant's affidavit accepting responsibility was narrowly tailored and judge found it insincere). In addition, defendants' failure to pay the Government, as agreed, $22 million prior to sentence, in lieu of all possible forfeiture and fines, further demonstrates to the court that defendants are not the least bit sincere or remorseful. If all "acceptance of responsibility" required is to have a defendant's attorney, after trial, submit a narrowly tailored statement saying that his client recognized some of the offenses that he committed, then every defendant would earn a two level reduction. This is not what the Sentencing Commission could have intended.

G. Obstruction of Justice

§ 3C1.1 of the Guidelines allows a sentencing judge to add two levels to a defendant's sentence if he has "willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense." Section 3C1.1 requires that the defendant consciously act with the purpose of obstructing justice and a finding of specific intent is necessary. *United States v. Thomas-Hamilton*, 907 F.2d 282, 285 (2d Cir. 1990). In addition, application note 2 requires that suspect testimony be evaluated in a light most favorable to the defendant. There was some evidence that Vulpis attempted to bribe Lieutenant Dave Baker and Officer Milewski of the New York State Environmental Conservation Force. However, the court finds that Vulpis did not know that there was a federal investigation pending at the time of the alleged bribe or that the officers considered Vulpis' statements to be a bribe. In addition, the evidence presented at trial regarding the bribe was vigorously contested by the defendant. As such a two level increase is not warranted.

H. Multiple Count Adjustment

According to the multiple count rules in § 3D1.2, the fraud offense and the environmental offense cannot be grouped together and as such the fraud offense and the environmental offense are to be treated separately.[7] Under § 3D1.4 the court is directed to take the highest offense level as the base offense. In this case it is the environmental offense in which Paccione and Vulpis each have sentencing levels of twenty-six as compared to the fraud offense in which the sentencing level is twenty-three. Under § 3D1.4(a), the environmental offense is counted as one unit. An additional unit is added because the fraud offense which resulted in a total of twenty-three levels constitutes a group that is "from 1 to 4 levels less serious" than the environmental offense. Thus there are two units and two units warrant an increase of two levels which are to be added to the environmental offense under § 3D1.4. Paccione and Vulpis each have twenty-eight levels. Twenty-eight levels corresponds to a sentence of 78-97 months.[8]

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[7] Application note 15 of § 2F1.1 (the fraud offense) allowed the court to look at the environmental offense. However, application note 15 does not state whether the offense levels from the fraud offense and the environmen-

Turning back to § 2E1.1 which governs RICO, the offense level of twenty-eight, derived from the fraud offense and the

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tal offense should be added together using a multiple count adjustment or whether only the defense level from the underlying analogous guideline should be used, in this case the environmental offense. This court has chosen to add the two offense levels together using the multiple count adjustment. In this way, the sentence will reflect the fact that the defendants engaged in fraudulent activity which resulted in environmental harm. Alternatively, if this court were only able to look at the environmental offense, this court would have had to depart upward under § 5K2.0 to take into account the fact that the defendants had defrauded various agencies and individuals. Under these circumstances, this court would have departed at least two levels. Thus the resulting level would have been the same even if the court did not use the multiple count adjustment.

[8] Even if the court had not independently added the four levels for role in the offense to both the fraud offense and the environmental offense, the result would have been the same if the court added the four levels at this point, after the multiple count adjustment had been considered. Without the four additional levels added to the environmental offense and fraud offense, the fraud level would have been nineteen and the environmental offense level would have been twenty-two. After the multiple count calculation was complete, the level would be twenty-four: one unit would be added for the highest offense of twenty-two and another unit added because the fraud offense was less than four levels lower than the environmental offense. Because there are two units, two levels would be added on to the twenty-two levels derived from the environmental offense. Thus the level would be twenty-four. With the additional four points for role in the offense added, the final level would have been twenty-eight.

environmental offense, is higher than the offense level of twenty-three derived from the RICO offense. *See supra*, at 374. Therefore § 2E1.1(a)(2) directs that the higher offense level be employed to determine the sentence. Thus the offense level of twenty-eight will be used.

I. Upward Departure

Vulpis and Paccione were provided with adequate notice of the fact that this court was contemplating an upward departure from the Guidelines. *See United States v. Jagmohan*, 909 F.2d 61 (2d Cir. 1990) (discussing importance of giving adequate notice); *United States v. Kim*, 896 F.2d 678, 681 (2d Cir. 1990) ("[A] sentencing judge contemplating an upward departure should inform the defendant of the factors that the judge is planning to rely upon and offer some brief explanation as to why these factors warrant a departure."); *United States v. Palta*, 880 F.2d 636, 640 (2d Cir. 1989) ("Adequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness."). Defendants were aware that the court considered the amount of the fraud, the complexity of the fraud and the fact that defendants defaulted upon a $22 million court-approved settlement with the Government to be extremely serious.

Under the Guidelines, a sentencing judge is to impose a sentence within the applicable Guideline range "[u]nless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). Such an analysis requires that the judge examine what categories of circumstances the Commission adequately considered in formulating the Guidelines. *Kim*, 896 F.2d at 682. Consistent with this approach is the fact that a district judge "is granted wide discretion in determining what aggravating or mitigating circumstances to consider when deciding upon an upward departure from the guidelines." *Palta*, 880 F.2d at 639; *United States v. Correa-Vargas*, 860 F.2d 35, 37 (2d Cir. 1988). *See also*, *United States v. Colon*, 905 F.2d 580, 584 (2d Cir. 1990); *United States v. Sturgis*, 869 F.2d 54, 57 (2d Cir. 1989) ("it is best to allow district judges 'sensible flexibility' in sentencing under the new act.").

The appropriate manner in which to depart upward is to examine the next higher category in sequence to determine if it adequately reflects the seriousness of the defendant's conduct. Doing so affords the judge the opportunity to compare the defendant's conduct with its aggravating circumstances, to the type of conduct for which the Commission had prescribed more severe punishment. *Kim*, 896 F.2d at 685; *United States v. Coe*, 891 F.2d 405, 413 (2d Cir. 1989) (judge should examine next higher category in sequence to determine prior history category).

Although the facts of this case are unique, the Sentencing Guidelines explicitly give a judge the authority to depart upward. As previously discussed § 2F1.1(b)(2), which governs the fraud offense, provides for an enhancer, in part, when there was more than one victim of the fraud, the fraud involved more than minimal planning or the offense involved violation of a judicial decree. The court has the discretion under application note 1 to § 2F1.1 to depart upward from the Guidelines. The application note states, "the adjustments in § 2F1.1(b)(2) are alternative rather than cumulative. If in a particular case, however, several of the enumerated factors applied, upward departure might be warranted." In this case, defendants engaged in conduct which involved all three of the above aggravating factors found in § 2F1.1(b)(2). Thus this court finds that Vulpis' and Paccione's level should be increased in order to adequately reflect the fact that more than one aggravating factor was involved. Since the Guidelines call for an enhancer of two for aggravating conduct which falls under just one of the subsections, this court concludes that it is reasonable and necessary to depart upwards from the Guidelines by an additional two levels. This brings the total levels for defendants to 30 and corresponds to a sentencing range of 97-121 months.

In addition, prior to the jury's verdict, defendants entered into a Settlement Agreement with the Government that provided that if defendants were found guilty, they would pay the Government $22 million in lieu of forfeiture and fines. *See* Appendix B. Under the terms of the agreement, defendants were jointly and severally liable. In exchange defendants received a complete resolution to any financial penalties rather than allowing the jury to determine any possible forfeiture and the court any possible fines. Under the agreement, the entire $22 million was due, in full, by September 8, 1990, after two prior installment payments. Sentencing was scheduled for September 12, 1990. The agreement contemplated that the money would be raised by the selling off of the numerous waste carting businesses which Paccione and Vulpis owned and which corporations were also defendants in this case. This court approved the agreement as requested by the parties.

As of this date, however, defendants have not paid one penny to the Government. Defendants claim that they were unable to make the required payments because of difficulty in selling their businesses. This court concludes that defendants had difficulty selling their business, but it is also the view of this court that defendants knew full well when they entered into the agreement that they would be unable to sell their businesses within the short amount of time for which the agreement provided without prior offers to buy from bona fide purchasers. The private waste carting business is a closed market and potential buyers consist largely of friends and relatives of defendants. In fact, there was testimony that one attorney provided the legal work for the overwhelming majority of the transactions in the private waste carting industry. Tr. at 242, September 12, 1990. The court finds and concludes that friends and relatives cooperated with defendants in not purchasing the lucrative businesses owned by defendants and allowing defendants to remain in possession. Defendants had to have been aware of the fact that there would not be any buyers when they entered into the agreement. Defendants' actions caused the question of forfeiture to be taken away from the jury and has caused this court's hands to be tied with respect to the fines.

In addition, there was also testimony that, even if defendants had entered into a contract with a buyer, it could take as much as two years to obtain a license from New. York City's Department of Consumer Affairs. Tr. at 237-238 (September 12, 1990). Paccione and Vulpis, who were both involved in the carting business for many years before their trial, were aware of the procedures involved in selling a business and had to know that a sale of a business in such a short time, even with a ready, able and willing buyer, was close to impossible.

Defendants had more than ample warning that this court considered their failure to pay a grave issue. At the sentencing hearing, the court thoroughly warned defendants that their failure to pay the Government constituted a fraud on the Government and that due to such failure the court would consider an upward departure. Tr. at 125-126 (September 12, 1990).

This court finds that defendants' actions constitute a fraud upon both the Government and this court because the agreement caused the issue of forfeiture to be withdrawn from the jury and prevents the court from imposing fines. Under § 5K2.0, this court has discretion to depart upward if an aggravating circumstance exists that the Commission did not take into consideration. This court finds that the Sentencing Commission did not consider the unusual circumstances that present themselves in this case. Here, defendants have perpetrated not only the fraud for which they were convicted, but also an additional fraud on both the Government and this court. As such, an additional departure is warranted for both Paccione and Vulpis. An additional two levels shall be added to both of their levels. The court has chosen to add two levels because the conduct that defendants engaged in involving the forfeiture agreement is closely analogous to § 3C1.1 which provides that two levels shall be added if defendants willfully obstructed or impeded proceedings. Thus their total level is thirty-two which corresponds to a sentencing range of 121-151 months.

Alternatively, the court could have chosen to add the two points under § 3C1.1. Section 3C1.1 states: "If the defendant willfully impeded or obstructed or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase . . . by 2 levels." The court's decision rests upon § 5K2.0 only because it is unclear whether § 3C1.1 applies to the circumstances of this case. It appears that § 3C1.1 applies to circumstances such as interfering with a witness, perjury or destroying evidence. *See* § 3C1.1, application note 1. It is, however, conceivable that § 3C1.1 would also apply in this case. As such, the court will discuss § 3C1.1 as an alternative to upward departure.

Commentary to § 3C1.1 states that such an enhancer may be applied to "a defendant who engages in conduct calculated to mislead or deceive authorities or those involved in a judicial proceeding, or otherwise to willfully interfere with the disposition of criminal charges, in respect to the instant offense." "The word 'willfully' as used in section 3C1.1 requires that the defendant consciously act with the *purpose* of obstructing justice." *United States v. Thomas-Hamilton*, 907 F.2d 282, 285 (2d Cir. 1990) (citing *United States v. Stroud*, 893 F.2d 504, 507 (2d Cir. 1990)) (emphasis in original). Thus a finding of specific intent is necessary. *Id.* "Guidelines §§ 2F1.1 and 3C1.1 are not mutually exclusive. The Guidelines specifically contemplate that both Chapter Two Guidelines relating to specific offense characteristics and § 3C1.1 are to be considered in reaching an appropriate sentence." *United States v. Irabor*, 894 F.2d 554, 556 (2d Cir. 1990).

In addition, application note 2 provides that, "[i]n applying this provision, suspect testimony and statements should be evaluated in a light most favorable to the defendant." "While this clearly does not require the sentencing judge to automatically accept the defendant's testimony as true, we believe that Note 2 'instructs the sentencing judge to resolve in favor of the defendant those conflicts about which the judge, after weighing the evidence has no firm conviction.' " *Thomas-Hamilton* 907 F.2d at 285 (citing *United States v. Franco-Torres*, 869 F.2d 797, 801 (5th Cir. 1989)).

Thus as an alternative to an upward departure, the court finds that both the defendants intentionally entered into the $22 million agreement without bona fide purchasers in sight knowing that the businesses could not be sold within the ninety day period because of procedural requirements. If points were added under § 3C1.1, those additional levels would have been added to both the fraud and the environmental offenses with the end result being a two level increase—the same result as adding two levels under § 5K2.0.

III. ADDITIONAL POINTS

The Government has argued that the court should depart upward because § 2F1.1 does not fully account for the harmfulness and seriousness of Vulpis' and Paccione's crimes. In addition, they argue that the court should depart upward from § 2Q1.2 because that section does not contemplate the quantity of illegal dumping in which Paccione and Vulpis engaged. Although the crimes of Vulpis and Paccione are extremely serious, the court finds that the Sentencing Commission did contemplate offenses which would cause serious environmental and financial consequences. This is witnessed by the additional fourteen levels from the base environmental offense of eight which defendants were assessed due to the very serious and environmentally harmful nature of the offense under § 2Q1.2. In addition, whereas § 2F1.1 does not, standing alone, take into consideration the extent and harm of defendants' fraudulent activity, § 2F1.1 in combination with application note 15, which allowed the court to look at § 2Q1.2, does adequately provide for defendants' activity. Because of the Sentencing Commission's inclusion of application note 15, the court cannot depart upward because the Commission contemplated the possibility of such an unusual case.

This Court is sentencing defendants to 151 months. This point in the sentencing range was chosen because of the tremendous harm which defendants caused to both individuals, agencies and our environment. One hundred and fifty one months adequately reflects the seriousness of defendants' behavior and takes into consideration the harm which their victims and our environment have suffered.

Finally § 5D3.1 requires a term of supervised release if the defendant is sentenced to a prison term of more than twelve months. Because defendants were convicted of class C and D felonies under § 5D3.2(b)(2), a term of 2-3 years supervised release must be imposed. The court imposes a term of three years supervised release. The terms of supervised release shall be the standard terms as laid out by the Sentencing Commission. In addition defendants shall be prohibited from participating, in any form, in the private waste carting industry during that period of supervision. As previously stated, Vulpis shall pay a special assessment of $350 and Paccione shall pay an assessment of $400.

The Federal Sentencing Guidelines were adopted to promote uniformity in sentencing. This case demonstrates how complex the Guidelines can be. It also demonstrates the number of variables which a case can present and the discretion that a sentencing judge still possesses. However, the Sentencing Guidelines succeed in at least one respect. The Guidelines force a judge to meticulously analyze and explain in much greater detail than in past practice why a particular sentence was chosen.

So Ordered.

APPENDIX A

SPECIAL VERDICT FORM
COUNT ONE—RICO SUBSTANTIVE

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
JOHN McDONALD		✓
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.		✓
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT ONE: MAIL FRAUD ON CITY GOVERNMENT AGENCIES

RACKETEERING ACT #1(a)

(Mail Fraud on Department of Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #1(b)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #1(c)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #1(d)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #1(e)

(Mail Fraud on Department of Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT TWO: MAIL FRAUD ON STATE GOVERNMENT AGENCY

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT THREE: MAIL AND WIRE FRAUD ON CSX

RACKETEERING ACT #3(a)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(b)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(c)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(d)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #3(e)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(f)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT FOUR: MAIL AND WIRE FRAUD ON CSX

RACKETEERING ACT #4(a)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(b)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(c)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(d)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(e)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(f)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(g)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(h)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(i)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT FIVE
(Mail Fraud on Clovelake Nursing Home)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT SIX
(Mail Fraud on Nephrology Foundation of Brooklyn)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT SEVEN
(Mail Fraud on Coney Island Health Insurance Program)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT EIGHT
(Mail Fraud on Coney Island Hospital)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT NINE

(Mail Fraud on Downstate Medical Center)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT TEN

(Mail Fraud on Kings County Hospital)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT ELEVEN

(Mail Fraud on Brooklyn Veteran's Administration)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT TWELVE: MAIL FRAUD ON STATE GOVERNMENT AGENCY

RACKETEERING ACT #12(a)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT #12(b)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT #12(c)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT THIRTEEN

(Mail Fraud on Long Island College Hospital)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT FOURTEEN

(Mail Fraud on Brooklyn Kidney Center)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT FIFTEEN

(Mail Fraud on Dr. Cyprys)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT SIXTEEN

(Mail Fraud on Dr. Vinograd)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT SEVENTEEN

(Mail Fraud on Dr. Vado)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

COUNT TWO—RICO CONSPIRACY

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
JOHN McDONALD		✓
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.		✓
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT ONE: MAIL FRAUD ON CITY GOVERNMENT AGENCIES

RACKETEERING ACT #1(a)

(Mail Fraud on Department of Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #1(b)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #1(c)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #1(d)

(Mail Fraud on Departments of Transportation and Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #1(e)

(Mail Fraud on Department of Sanitation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT TWO: MAIL FRAUD ON STATE GOVERNMENT AGENCY

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT THREE: MAIL AND WIRE FRAUD ON CSX

RACKETEERING ACT #3(a)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(b)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(c)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(d)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #3(e)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT #3(f)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

RACKETEERING ACT FOUR: MAIL AND WIRE FRAUD ON CSX

RACKETEERING ACT #4(a)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(b)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(c)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(d)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(e)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(f)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(g)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(h)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT #4(i)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

RACKETEERING ACT FIVE
(Mail Fraud on Clovelake Nursing Home)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT SIX
(Mail Fraud on Nephrology Foundation of Brookyn)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT SEVEN

(Mail Fraud on Coney Island Health Insurance Program)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT EIGHT

(Mail Fraud on Coney Island Hospital)

	FOUND	NOT FOUND
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

RACKETEERING ACT NINE

(Mail Fraud on Downstate Medical Center)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT TEN

(Mail Fraud on Kings County Hospital)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT ELEVEN

(Mail Fraud on Brooklyn Veteran's Administration)

	FOUND	NOT FOUND
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

RACKETEERING ACT TWELVE: MAIL FRAUD ON STATE GOVERNMENT AGENCY

RACKETEERING ACT #12(a)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT #12(b)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT #12(c)

(Mail Fraud on Department of Environmental Conservation)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT THIRTEEN

(Mail Fraud on Long Island College Hospital)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT FOURTEEN

(Mail Fraud on Brooklyn Kidney Center)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT FIFTEEN

(Mail Fraud on Dr. Cyprys)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT SIXTEEN

(Mail Fraud on Dr. Vinograd)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

RACKETEERING ACT SEVENTEEN

(Mail Fraud on Dr. Vado)

	FOUND	NOT FOUND
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

COUNT THREE

(Mail Fraud—Department of Sanitation)

	GUILTY	NOT GUILTY
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

COUNT FOUR

(Mail Fraud—Departments of Transportation and Sanitation)

	GUILTY	NOT GUILTY
ANGELO PACCIONE		✓
ANTHONY VULPIS		✓
A & A LAND DEVELOPMENT		✓
AUGUST RECYCLING, INC.		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓
ROSEDALE CARTING, INC.		✓
VULPIS BROTHERS, LTD.		✓

COUNT FIVE

(Mail Fraud—Departments of Transportation
and Sanitation)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

COUNT SIX

(Mail Fraud—Departments of Transportation
and Sanitation)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

COUNT SEVEN

(Mail Fraud—Department of Sanitation)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

COUNT EIGHT

(Mail Fraud—CSX Corp.)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

COUNT NINE

(Mail Fraud—CSX Corp.)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS	✓	
A & A LAND DEVELOPMENT	✓	
AUGUST RECYCLING, INC.	✓	
NATIONAL CARTING, INC.	✓	
STAGE CARTING, INC.	✓	
ROSEDALE CARTING, INC.	✓	
VULPIS BROTHERS, LTD.	✓	

COUNT TEN

(Mail Fraud—Coney Island Hospital)

	GUILTY	NOT GUILTY
ANGELO PACCIONE		✓
NATIONAL CARTING, INC.		✓
STAGE CARTING, INC.		✓

COUNT ELEVEN

(Mail Fraud—Kings County Hospital)

	GUILTY	NOT GUILTY
ANTHONY VULPIS		✓
ROSEDALE CARTING, INC.		✓

COUNT TWELVE
(Mail Fraud—Dr. Vado)

	GUILTY	NOT GUILTY
ANGELO PACCIONE	✓	
ANTHONY VULPIS		✓
JOHN McDONALD	✓	
NEW YORK ENVIRONMENTAL CONTRACTORS, INC.	✓	

APPENDIX B

[Letterhead of the United States Attorney
for the Southern District of New York]

June 6, 1990

Honorable Constance Baker Motley
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Angelo Paccione, et al,
SSS 89 Cr. 446 (CBM)

Dear Judge Motley:

This letter sets forth the agreement of the parties in the captioned case with respect to forfeitures, pursuant to Title 18, United States Code, Section 1963, and other financial penalties which the defendants face as a result of their convictions in this action. This agreement is subject to approval by the Court.

Upon conviction under Title 18, United States Code, Section 1962, the defendants Angelo Paccione, National Carting, Inc., Stage Carting, Inc., August Recycling, Inc., Anthony Vulpis, Rosedale Carting, Inc., Vulpis Brothers, Ltd., and A & A Land Development, hereby forfeit to the Government the sum of $22 million in full satisfaction of the forfeiture penalties set forth in Title 18 United States Code, Section 1963, as contained in paragraphs 64 through 68 of Indictment SSS 89 Cr. 446 (CBM), as well as whatever fines and restitution might otherwise be imposed pursuant to Title 18, United States Code. The defendants named above hereby waive any defenses or challenges to the forfeiture provisions of the Indictment.

The payment of the sum of $22 million shall be made by certified or bank check payable to the United States of America as follows: the sum of $4 million shall be paid on or before the thirtieth day from the date of the signing of this agreement; the sum of $8 million shall be paid on or before the sixtieth day from the date of the signing of this agreement; and the sum of $10 million shall be paid on or before the ninetieth day from the date of the signing of this agreement. The failure to make each of these payments in full and on the dates required by this agreement shall constitute a default of the terms of this agreement. Upon payment, these funds shall be maintained by the Government pending the resolution of any appeals in the captioned case, or any retrials on remand and any appeals therefrom.

Each defendant named above shall be jointly and severally liable for the entire sum of $22 million. Each defendant shall execute and provide to the Government at the time this agreement is signed a confession of judgment in a form satisfactory to the Government in the amount of $22 million, copies of which are annexed hereto and made a part hereof. In the event of a default by the defendants named above in the payments required by this agreement, the Government shall have the right at its sole option and discretion to enter the confessions of judgment and the defendants named above waive notice with respect to such entry by the Government. The defendants named above also waive the right to interpose any pleadings, motions, objections or other response in connection with the entry by the Government of the confessions of judgment and, if any pleadings, motions, objections or other response is interposed, it is hereby withdrawn.

A Trustee or Trustees, appointed by the Court upon the Government's recommendation, shall oversee the operation of the respective companies under terms to be set forth by further Order of the Court until such time as the Government has received payment in full as provided for in this agreement. The Trustee's fees shall be paid by the defendants named above, who shall be jointly and severally liable for those fees.

Angelo Paccione, Anthony Vulpis and John McDonald do hereby immediately forfeit their employment, titles, and positions with each of the defendant companies named above, and any successors in interest to these corporations. They shall no longer participate in any way in the affairs of the corporations, or in the private carting industry in any capacity. Their names shall be removed as officers of the corporations. They shall no longer have any authority to act as agents for those corporations except as specifically described below.

Angelo Paccione and Anthony Vulpis shall be permitted, however, to participate as agents for the defendant corporations solely for the purpose of negotiating for the sale of their respective ownership interests in and the assets of these corporations, which sales are expressly contemplated by this agreement.

Any encumbrance or sale of any asset of the defendant corporations or any encumbrance or sale of the interests of Angelo Paccione or Anthony Vulpis in the defendant corporations or any sale or encumbrance of any of the defendant corporations themselves shall be subject to prior written approval of the Government. Without such prior written approval, no encumbrance or sale may take place.

The Restraining Order signed by this Court on September 21, 1989 shall remain in effect until such time as the Government has received payment in full as provided for in this agreement.

The parties agree jointly to recommend to the Court that sentencing shall occur ninety days from the date of the signing of this agreement, subject to the convenience of the Court.

The Government consents to release of the individual defendants on bail until the date of sentencing, or ninety days from the date of execution of this agreement, whichever comes first. The defendants' release on bail is subject to their full compliance with the terms and conditions of release imposed by the Court. The bail conditions of Angelo Paccione and Anthony Vulpis are hereby amended as follows. Each is released on a $2 million personal recognizance bond, co-signed by two financially responsible persons, such co-signatures to be provided within two weeks from the date of the signing of this agreement, and secured by the homes which have previously been posted as security to the Government. Further, both Angelo Paccione and Anthony Vulpis shall report daily to Pre-Trial Services by telephone, and once a week in person. The present bail conditions of John McDonald remain in effect.

This agreement shall constitute a complete resolution of any and all financial penalties, with the exception of the $50 mandatory special assessments, which the defendants face as a result of their convictions after trial in the captioned case.

This agreement does not in any way preclude any civil or other actions that might be brought against any of the defendants arising out of the actions for which the defendants have been convicted in this case.

Agreed and Consented to:

OTTO G. OBERMAIER
United States Attorney

By: /s/ ELLIOT R. PETERS
ELLIOT R. PETERS
JEFFREY B. SKLAROFF
KEVIN J. FORD
Assistant United States Attorneys

/s/ ANGELO PACCIONE
ANGELO PACCIONE, individually and on behalf of
NATIONAL CARTING, INC.,
STAGE CARTING, INC.,
AUGUST RECYCLING, INC.,
A & A LAND DEVELOPMENT

/s/ GUSTAVE H. NEWMAN, ESQ.
GUSTAVE H. NEWMAN, ESQ.,
Attorney for ANGELO PACCIONE,
NATIONAL CARTING, INC.,
STAGE CARTING, INC.,
AUGUST RECYCLING, INC.,
A & A LAND DEVELOPMENT

/s/ ANTHONY VULPIS

ANTHONY VULPIS, individually and
on behalf of
ROSEDALE CARTING, INC.,
VULPIS BROTHERS, LTD.,
A & A LAND DEVELOPMENT

/s/ BENJAMIN BRAFMAN, ESQ.

BENJAMIN BRAFMAN, ESQ.,
Attorney for ANTHONY VULPIS,
A & A LAND DEVELOPMENT

/s/ DOMINICK VULPIS

DOMINICK VULPIS, on behalf of
ROSEDALE CARTING, INC.,
VULPIS BROTHERS, LTD.

/s/ MICHAEL VULPIS

MICHAEL VULPIS, on behalf of
ROSEDALE CARTING, INC.,
VULPIS BROTHERS, LTD.

/s/ MICHAEL ROSS, ESQ.

MICHAEL ROSS, ESQ., Attorney for
ROSEDALE CARTING, INC.,
VULPIS BROTHERS, LTD.

SO ORDERED:

/s/ CONSTANCE BAKER MOTLEY

CONSTANCE BAKER MOTLEY
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 8, 1990

AMENDED OPINION RE SENTENCING

United States of America

v.

John McDonald, Defendant.

Defendant McDonald shall have a fine of $79,500.00 imposed upon him. This fine is derived from § 5E4.2(c)(2)(C) of the Federal Sentencing Guidelines which authorizes a court to impose a fine of "three times the gross pecuniary gain to all participants in the offense." This court finds that there was a gross pecuniary gain of $26,500 derived from the fraud involving New York Environmental Contractors.

APPENDIX E

ORDER OF UNITED STATES COURT OF APPEALS ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of January one thousand nine hundred and ninety-two.

FILED: January 10, 1992

Nos. 90-1587, 90-1589, 90-1591, 90-1593,
90-1629, 90-1588, 90-1590,
90-1592, 90-1597

UNITED STATES OF AMERICA,

Appellee,

-against-

ANGELO PACCIONE; ANTHONY Y. VULPIS; JOHN J. McDONALD, A&A LAND DEVELOPMENT; STAGE CARTING, INC.; AUGUST RECYCLING, INC., NEW YORK ENVIRONMENTAL CONTRACTORS, INC., NATIONAL CARTING, INC.; ROSEDALE CARTING, INC.; and VULPIS BROTHERS, LTD.,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed by Defendant-Appellants Anthony Vulpis, Rosedale Carting and Vulpis Brothers, Ltd.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ______________________________
Elaine B. Goldmsith,
Clerk